(1) Supreme Court, U.S.
FILED

031637 JAN 29 2004

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re

DANIEL JAMES BARNETT
Petitioner,

v.

STATE OF COLORADO
Respondent.

Petition for an Extraordinary Writ of Certiorari
in the United States Court of Appeals for the
Tenth Circuit 03-1225

PETITION FOR WRIT OF CETIORARI

Daniel James Barnett,
6001 South Yosemite St K201
Greenwood Village, Co., 80111
(303) 796-9687

Network Document Services - 303.534.6691 - Denver, CO 80202

QUESTION PRESENTED

Can the lowest Colorado crime equal a crime two levels in difference higher by established fact in Colorado with the higher being labeled by statute as "extraordinary" by the legislature without violating the equality clause established in Brown v. Board of Education, 347 U.S. 483 (1954) as never before has happened in the United States, and does "almost charged with" equal "conviction" as referenced by the Federal Court of Appeals Opinion in any state of the Union, and does the Constitution not allow for suits to be filed against the state under the fourteenth amendment with due process violations where today there are four counts and each one would be enough to abrogate the eleventh amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INDEX TO APPENDICES v

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 2

CONCLUSION 18

TABLE OF AUTHORITIES CITED

Page

CASES

Brown v. Board of Education,347 U.S. 483 (1954) i

Palmer v. Thompson Hastings Law Journal 23, no. 1 (November 1971): 889 17

Fitzpatrick v. Bitzer, 427 U.S. 456. Pp 13-16 6

Dellmuth v. Muth, 491 U.S. 223, 27-228 6

Parden v.Terminal Railway of Alabama Docks Dept., 377 U.S. 184(1964) 6

City Of Borne v. Flores ,521 U.S. 507, 517, 520 (1997) ... 5, 19

Seminole Tribe of Florida v. Florida 517 U.S. 44(1996) 6

Florida Prepaid v. College Savings Bank and United States ... 6

Zinermon v. Burch 494 U.S. 113, 125 (1990) 7

Parratt v. Taylor, 451 U.S. 527, 539-531 (1981) 9

Lane v. Pena , Secretary of Transportation, et al., 518 U.S. 187 (1996) 9

Franklin v. Gwinnett County Public Schools, 503 U.S. 60,70 . 7

Lapides v. Board of Regents (2002) 5

College Savings Bank v. Florida Prepaid (1999) 13

Simonson v. United Press International, Inc. 654 F. 2d 478 (7th Cir. 1981) 2, 9

Read v. Phoenix Newspaper, Inc. 819P2d 939 (Ariz.1991) 2, 9

People v. McClellan, 183 Colo. 176, 515 P. 2d 1127 (1973) . 10

People v. White, 182 Colo. 417, 514 P.2d 69 (1973) 10

People v. Mc Cormick, 856 P.2d 84 (Colo. 1993) 10

Heller v. Bianco 244 P.2d 757 (Cal. App. 1953) 14

Dan Barnett v.. Denver Publishing Company d/ba the Rocky Mountian News. 01-1367 (2001) 4, 11, 13

35 U.S.C., 271 (a) (1994 ed., Supp. III) 5 D. Chisom, Patents 16.02 (2), p.16-31 (rev. ed. 1998). Title VI of the Civil Rights Act of 1964 7

CONSTITUTIONS

Title 42, (1983) 1, 6

U.S. Const. Amend I 5,8

The State declined to address the VI, VIII, XIV amendment powers and Summary Judgment is appropriate.

U.S. Const. Amend VI 8, 18

U.S. Const Amend VIII 8, 18

U.S. Const. Amend XI ..... i, 1, 3, 5, 6, 8, 11, 18

U.S. Const Amend XIV ..... i, 1, 3, 4, 6, 7, 8, , 11

Colorado Constitution Art 2 , Section 10 ..... 15, 16

Colorado Constitution Art 2, Section 25 ..... 14, 15

Colorado Constitution Art 2, Section 25, IV ,(C) 2, 8

STATUTES AND RULES

C.R.S. Rule 8 13

INDEX TO APPENDICES

APPENDIX A ORDER AND JUDGMENT 1a

APPENDIX B ORDER DENYING PETITION FOR REHEARING 8a

APPPENDIX C CONCESSON FROM THE STATE OF PROPER ARGUMENT 9a

APPENDIX D LETTER OF INTERVENTION ABILITY FROM PRESIDENT BUSH BY EXECUTIVE ORDER 11a

APPENDIX E NOTICE OF APPEAL 13a

APPENDIX F MANDATE LETTER 15a

APPENDIX G GLOBAL IMPACT 16a

APPENDIX H TERMED APPEAL 18a

APPENDIX I ORDER 29a

APPENDIX J PETITION FOR AN EXTRAORDINARY WRIT OF CERTIORARI TO THE SUPREME COURT 32a

APPENDIX K ORDER OF COURT DENYNG PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT 37a

APPENDIX L PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS 39a

APPENDIX M ORDER REGARDING CAES SET FOR TRIAL 59a

APPENDIX N JUDGMENT AFFIRMED, ORDER

REVERSED, & CAUSE REMANDED WITH DIRECTIONS 65a

APPENDIX O ORDER DENYING PETITION FOR REHEARING 74a

APPENDIX P C.R.S. RULE 44 ..... 76a

APPENDIX Q UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS 77a

APPENDIX R REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORIARI 78a

APPENDIX S ORDER OVERRULLING OBJECTIONS AND ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION 94a

APPENDIX T SUPPLEMENTAL RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE 98a

APPENDIX U RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE 101a

STATEMENT OF THE CASE

First, the petitioner is thankful for a written opinion designated to be published it so that the truth will never be buried. Righteousness and the Constitution are on the side of petitioner. It is a blessing the case has been chosen for judgment and publication to insure a proper place in history so it needs to be right and carefully scrutinized. The Opinion is in clear error.

Plaintiff/Appellant, Daniel James Barnett, by and through the briefs requests an Extraordinary Writ of Certiorari as this case falls under Title 42, 1983. This case centers on equality clause and the right to due process and liberty protected by the fourteenth amendment as reigning supreme in this fight abrogating the eleventh amendment.[1]

JURISDICTION

A published Opinion was ordered on November 3, 2003, Appendix A, and a timely petition for rehearing, Appendix B, was denied by the United States Court of Appeals on November 3, 2003 . The petitioner is an F.E.C. registered public official running for United States Senator in 2004 and an F.E.C. registered candidate for President of the United States in 2008 requiring an extraordinary writ for clear and present danger. The state has conceded that no new evidence or claims were added in the Petition for Panel

Rehearing, Appendix H, and no new evidence not previously encapsulated will be added here today, but as previously encapsulated. The President of the United States by and through his attorney has written that he has no authority to act until it is in the courtroom, Appendix D.

REASONS FOR GRANTING THE WRIT

This federal court of appeals case would be creating new Doctrines of "Almost charged with" equals "conviction" as substantially true and the lowest state crime level in Colorado equals the highest as "Equal" even though there is a difference of two crime levels wiping out all criminal code. A first in this country. No, it is not a civil defamation case of sexual assault equals the same level of rape, Simonson v. United Press International, Inc. 654 F. 2d 478 (7th Cir. 1981) that surely the justices are aware of as cornerstone to crime level disparity, or brandishing a weapon of the first degree misdemeanor equals a first degree misdemeanor of firing a weapon in public in Read v. Phoenix Newspaper, Inc. 819P2d 939 (Ariz. 1991) but rather a third degree equals first degree here today. This is not equal and the equality clause does not allow for differences established by the legislature and distinctly separate by state statute. Art. 2, Section 25, IV, C.

The court would chose to create new case law for hundreds of future civil cases even though the justices have chosen not for oral argument as the lowest crime does not equal the highest crime in Colorado and cannot in good conscience be used an equality ideology. It invokes the protection of the equal protection clause. This is not "separate but equal" of a black man not being able to swim in a public swimming pool as proven to be preposterous as a civil rights validation but a man equally fighting for proper reputation and dignity in a society. This is the first time in this country that equality is two-crime levels difference. It is a clear error to rule without acknowledging the facts under the equality clause. A pro se petitioner has every right to a have the Reply Brief read with an equally keen eye especially since the Opinion is shown to already have accidental and fundamentally relevant omissions of fact that are integral to understanding that this is not an eleventh amendment issue but rather a fourteenth amendments issue. Appendix G is a letter from a foreign person interested in the political contest. This shows there would be a global misconception in countries such as Iraq that a person can be convicted of a crime without being charged. The United States should not be setting an example of how federal rule allows for almost charged with to be convicted within the briefs of the court Opinion.

The petitioner will now prove the Constitution of the United States is valid and new case law allowing for deviations to the equality clause would be *sui generis* and clear error. The Opinion leaves out crucial elements and it incorrect in the drawn conclusion. Apparently the petitioner is not being clear and will point by point show why this case without action would be appealed to the United States Supreme Court for cruel and unusual punishment, a violation of the equal clause, and the due process clause. It is quite confusing, like a puzzle that can be traced the entire way with evidence in public records for deposition, trial, and for reporters to verify every truthful detail. The Opinion is incorrect and incomplete. The first element as stated in the Reply Brief as omitted by the state as an elementary fact to understanding this case is that there are two differences of crime level. The lowest and the highest in the state of Colorado and not equal levels, the equality clause has been violated.

It left out the two levels of differences in crime level, which immediately triggers a violation of the equality clause of the fourteenth amendment. Second it omits that the civil defamation case was appealed to the United States Supreme Court under correct procedures and ended in case number U.S.S.C. 01-1367 on page three. Either it was intentionally omitted, as is not the case here, left out because the reply briefs were not read which is not

the case here, or that it was simply overlooked. If it is agreed upon the justices that it simply overlooked it may be a good idea to reread the Reply Brief for other errors of oversight as would seem logical for the important facts to understand the case. The published Opinion needs to be corrected so that proper review in the United States Supreme Court, and so that the President Bush of the United States of America and Governor Owens of Colorado will have an accurate account of the constitutional problem the state of Colorado is facing and the challenge to the Constitution so there will be a correct understanding of exactly what is happening if not reviewed in this court room as without finality.

This case is not going from state court to a federal court and therefore *Lapides* is not the center of the argument. 1. *Lapides* is only part of the discussion to the element of moral vantage point and is not the center of case law. Following the reasoning of City Of Borne v. Flores, 521 U.S. 507, 517, 520 (1997) we must identify that the purpose of the change of the eleventh amendment was intended to remedy "evil" and "wrong" events. *Id.*, at 525. The United States Supreme Court always rules against evil. It was not in discussion for the value of case law proof of abrogation of the eleventh amendment. The Opinion centered on the Feldman Doctrine and the eleventh amendment but rather should have centered on the Reply Briefs and the entire Opinion should have

been based on the Title 42, Sec. 1983, of civil rights as guaranteed by the federal constitution. Here is where the petitioner pounces on the center of the debate and the balances of justice tips towards the petitioner. **Congress has abrogated the States eleventh amendment defense with the fourteenth amendment, Section 5,** Fitzpatrick v. Bitzer, 427 U.S. 456. Pp. 13-16 which prohibits against the deprivation of civil rights of the United States Constitution and satisfies the standard of Congressional abrogation set forth in Dellmuth v. Muth, 491 U.S. 223, 227-228 and the less strict standard of Parden v.Terminal Railway of Alabama Docks Dept., 377 U.S. 184 (1964). A citizen cannot be deprived of liberty or property without due process of law without offending the fourteenth amendment. After Seminole Tribe of Florida v. Florida 517 U.S. 44 (1996) was decided and allowed for the fourteenth amendment powers to abrogate the immunity from suit, *Supra*, at 59, The United States Supreme court upheld Florida Prepaid v. College Savings Bank and United States and the use of the fourteenth amendment with backing from the United States and found "No sound reason to hold that Congress cannot subject a state to the same civil consequences that face a party infringer." *Id.*, at 1335. Congress allows distinctions to exist that must be observed. *Id.*, at 519-520. The eleventh amendment has abrogated the fourteenth amendment and thus nullifies the states arguments. A person can sue the state for due process violations

and today there are four counts. The United States Supreme Court has held that procedural due process claims, and the deprivation of state action of constitutionally protected interest is not in itself unconstitutional; what is unconstitutional is the deprivation of liberty. Zinermon v. Burch 494 U.S. 113, 125 (1990). The State is attempting to create a new law here that says all state crime regardless of level of crime are equal and will not block this broadcast and the Attorney General fully intends to allow this information to be published even though it was proven false and a fact of two differences by crime classification. Knowledge and intent are considered with respect to damages in deprivation of the fourteenth amendment. See 35 U.S.C., 271 (a) (1994 ed., Supp. III) 5 D. Chisom, Patents 16.02 (2), p.16-31 (rev. ed. 1998). Monetary damages awards are available under Title VI of the Civil Rights Act of 1964. See, *e.g.* Franklin v. Gwinnett County Public Schools, 503 U.S. 60,70. The Opinion omits that there are two crime level differences or the lowest established equaling the highest established and not contested by the state in this courtroom or in other words all being the same classification. This will confuse students of the law as obtuse of the equality clause as unequal and this has never before happened in the country.

They are different and unequal. Not even by one level but two. Not even one crime level difference has ever been equal in this

country. Why are we starting now? This triggers the equal protection clause. Article 2, Section 25, IV, (C) with differences in criminal code. There is no stalking crime of the lowest level nor one level higher. Furthermore to leave it as such, would allow for new "Almost Charged With" equals "Conviction" Doctrine and the "lowest crime level equals the highest crime" level Doctrine replacing the "Substantial Truth" Doctrine as the new and undisputed lower threshold of equality and of accountability invoking the sixth amendment. These two federally blessed strategies would try up civil courtrooms for years with erroneous, unfair, and inappropriate case law logic used by defense attorneys as new established precedent that will affect hundreds if not thousands of future cases with incorrect application of the law. This deviation does not stack up like a pyramid of logic as opposite of all present day case law and the justices may not have known the fourteenth amendment has been abrogated by the eleventh.

2. Never before in this country has a person been held accountable for a higher level of crime in either a civil or criminal court. Interchangeable words of equal levels are allowable in state and federal criminal code. Such as sexual assault and rape, Simonson v. United Press International, Inc., *supra*, or the lesser standard of brandishing a weapon or discharging a gun in public.

Read v. Phoenix Newspaper, Inc., *supra*. Both first degree misdemeanors by a public official. Not a third degree crime and a first degree "extraordinary" by statute crime, which carries a sentence enhancer for this reason. This difference is already established courtroom fact within U.S. S.C. briefs 01-1367 that automatically triggers the equal protection clause. The petitioner will list in time line, violations of due process by the state which any one is grounds for suit under the fourteenth amendment which allows citizens to hold the right to sue the state, as each is appropriate subject matter of due process violations and a pattern of abuse by the state. The petitioner is not incorrectly requesting a review of the previous decisions in previous courts. What we are reviewing is if procedures of law were constitutional in action or inaction. We are merely reviewing the Constitutional violations of due process which allows this case to move forward towards trial and the petitioner requests the case be put back on the docket as a jury trial would be a slam dunk. This petition is Constitutionally valid and the state has deviated four times. The Opinion of this federal appeals court along with the lower court does not address this due process grievances which gives citizens the right to sue the state of the fourteenth amendment for procedure rights guaranteed by the Constitution.

Count 1. The Opinion of this federal court of appeals failed to include which judge was to be sanctioned which leads readers of

the Opinion with the idea that it was a civil judge and not a criminal judge. In 1995 the defendant then was given a 30 day written plea agreement to probation violation. To get things over with and move on with life it was signed by the defendant as a plea agreement. This was handed to the judge and reviewed. The judge then sentenced the defendant to 180 days or six times longer and different that the 30-day agreement the judge reviewed. Can a judge review and ignore this written plea bargain and sentence six times greater? Yes _____ or No_____ Is this behavior acceptable to the processes of procedure law in Colorado? Why even have a plea if it does not matter? How does a reviewed written 30-day sentence turn into 180 days? This judicial behavior was cruel, unusual, and coercive by Ethan D Feldman of Arapahoe County in 1995 to extract a confession of guilt. If plea of guilty results from plea-bargaining and bargain not honored, the judgment must be vacated. People v. McClellan, 183 Colo. 176, 515 P. 2d 1127 (1973). The plea bargain may not be utilized to subvert truth or as means of forcing a plea People v. White, 182 Colo. 417, 514 P.2d 69 (1973) This the reason for the judicial misconduct charge and is before this court. Courtroom exhibits then mysteriously vanished from the file to prevent proper review. All of this can be proven with sworn testimony from four attorneys present that day. This is what is being covered up and has led to the final three due process violations of other judges

trying to prevent this judicial misconduct from coming out. It is enough to give a man nightmares for life. A plea agreement is more than merely a contract between two parties and must be attended by constitutional safeguards to ensure that a defendant receives the performance that he is due. People v. McCormick, 856 P.2d 84 (Colo. 1993).

Count 2. The Opinion of this federal court of appeals omitted that case U.S.S.C. 01-1367 was also correctly appealed to the end of the road in the United States supreme court and not mistaken appealed to the federal district court where surely some pro se plaintiffs would perhaps make such a mistake but not here. The correct courtroom was of jurisdiction and again shows that *Lapides* has no fundamental relevance to eleventh amendment abrogation by the fourteenth amendment and is not the issue and the wrong case law for jurisdiction. The court can gather this belief of the petitioner by reading from the Reply Brief and not the from the defenses papers.

In 1998 a suit was filed for defamation with felony in the clear and distinct statement for the claim for relief. This case was dismissed for not filing a summons properly. End of story. A new case was properly served and began fresh for the first time without the word felony in the statement for claim for relief. Here is where you

have to pay attention, as it gets tricky by the state. This is a brand new case at this point and never before heard in any court. One more error would have been fatal with only two chances as was the desperate strategy of the newspaper to win.

The questions presented for review were not reviewed. They were ignored. The case was dismissed in the district court. The court of appeals erroneously wrote that the statement for claim for relief included the word felony, which it did not. The paper argued entirely that it was the lowest form of crime in Colorado although the courts found otherwise. The court was pressured to make this statement for claim for relief up to cover up the whistle blowing, or in the alternative the court may have gotten the wrong dismissed case delivered from the district court in 1998. This was brought to the attention in the petition for a rehearing, again in the state Supreme Court and the United States Supreme Court. The case was dismissed for this reason, the Opinion states. There has been no justice. It is incorrect and false and proven erroneous. This information is within the exhibits entered in the federal district court. An Opinion cannot be based on a premise of a fatal flaw on false and incorrect information. The statement for claim for relief is included in U.S.S.C. case #01-1367, in the Petition for Extraordinary Writ of Certiorari to the United States supreme court and the state supreme court. No legal errors were made.

Due process in the civil courtroom has occurred. This is a flat out false statement by the Opinion of the civil court and the state of Colorado. This fact resulted in an incorrect Opinion, as what has happened is a violation of due process of having a different statement for claim for relief reviewed than that of the correctly filed statement for claim for relief in both the original district court and the Colorado court of appeals and the United States Supreme Court. There can be no change to the statement for claim for relief. Yes _____ No _____ The answer is no for justice. Colo.R.S. Rule 8 . Due process was violated as a perfect statement for claim for relief was filed correctly at every level without the word felony and the court of appeals deviated from the correct verdict, as it is an outright incorrect Opinion for this incorrect fact and therefore was entirely wrong. There was no fatal flaw and this is a flat out false factual claim by the state. The state is against the will of the sixth amendment, creating and reigning supreme an "Almost charged with" equals "Conviction" Doctrine replacing the "Substantial truth" Doctrine allowing for further additional persecution that is unwarranted, unfounded, and without charge for bringing a whistle blower accusation of the judicial misconduct claim with an attempt by the state to bury the accusations by changing the statement for claim for relief and with refusal to remove this unequal conviction from an operational electronic bulletin board. Heller v. Bianco 244 P.2d 757 (Cal.

App. 1953)

Count 3. Question presented for review in civil court were not reviewed. They were ignored and are due process violations. The lack of review of a constitutional question to be reviewed is the due process violation as mandatory. A new civil suit was filed without the word felony in the claim for relief in 1998 as previously stated. This presiding judge mysteriously vanished as local political pressure came in. The plaintiff was never notified nor consented to this, as the judge was the one that was wanted. The new judge improperly dismissed the case without legal authority as it was already scheduled for trial and settlement conference date was agreed upon by both parties to the suit by e-mail and this question for review was properly before the court of appeals. Article 2, Section 25 of the Colorado Constitution answers the question of, "Can a litigant have a judge removed and not be informed of this change." Federal district court sends a letter every time. Can this be done? Yes _____ or No_____ The state Constitution says no. Any first year law student would know the answer. The questions presented for review were not reviewed. Why were they ignored? This question was again a Question presented for review in the Colorado Supreme Court and the U.S. Supreme Court but was buried under the incorrect statement of claim for relief of the state and clearly

visible. There would have been no counter suit if Article 2, Section 25 of the Constitution would have applied as a matter of right. The case should have been remanded for this reason. In the court of appeals the newspaper counter sued for money and the court upheld this award even though the case was never supposed to be there because the judges had been unconstitutionally switched without notification. This is a due process violation.

Count 4. A jury trial for defamation is mandatory in Colorado Article 2, Section 10 and the court of appeals had no right to substitute itself for this jury. This again was a question presented for review in the Colorado Supreme Court and the U.S. Supreme Court and was not addressed. It cannot be ignored. There has never been a jury trial to date. Can the state bypass the Constitution? Is this a due process violation in regards to not allowing the case to go to trial to ascertain the level of sting of two unequal crimes as mandatory? Yes_____ or No_____ and then ignore this information as a question presented for review. This is a procedural due process violation of the Colorado state Constitution. Article 2, Section 10.

In regards to Count 3, and 4, the court of appeals did not address either of these claims even though repeatedly requested to do so and then wrote an Opinion without addressing them. The

petitioner's rights were clearly violated.

The petitioner has lost childhood friendships because the public now believes the petitioner is a convicted stalker of at least of an extraordinary nature by statute crime without rebuttal if no action of this court is taken. Many also believe from the article that it happened in 1998 or three years after the charge in question when in fact the petitioner was campaigning at another location by petition in the Cinco de Mayo parade and not simply a no show. Now it can even be said the petitioner has been convicted of a first degree crime and labeled such on educational campaign literature and newspaper articles with the blessings of the federal court in the current F.E.C. registered political contest for United States Senate in 2004 and for United States President in 2008 and all future elections. Convicted stalker can be posted across all literature and newspaper articles and news releases. Senator Campbell is reported in ill health and if he chooses not to run would put the election up grabs and would create an uncertain winner and put the election on national center stage. It is not called the "separate but equal" clause and it is just as unfair as a black man not being able to swim in a public swimming pool because of a skin tone test. Palmer v. Thompson Hastings Law Journal 23, no. 1 (November 1971): 889.

Many would vote for a man convicted of the same crime as tens of thousands of other citizens but many would not vote for a man convicted as an "extraordinary risk of violent harm to society" by statute. It could even affect unfairly affect the ability of the petitioner to find a mate to marry and have children and hurts the chances of the petitioners pursuit of happiness as many wise women these days hire investigators to find such information in a uncertain world.

Lastly, the petitioner runs a marketing Internet business and it could affect business relationships that take a long time to develop with this unequal and heinous crime label with search engines becoming increasingly more powerful. Essentially the federal court is holding a man accountable for a extraordinary crime without due process. The petitioner was not asking for the written ticket for harassment to be expunged. It happened and was shameful. It was not contested and a fine paid. Here are four counts of due process violations where liberty is guaranteed by the federal Constitution and each of them by themselves is enough to abrogate the eleventh amendment and allow the suit to continue or be appealed on such grounds. There is the element of an established fact of an equal protection clause violation. There is still clear and present danger and a cruel and unusual wrong of the eighth amendment that can still be mitigated and future harm can

still be averted by listening to the petitioner and issuing an injunction.

CONCLUSION

Any person can get out the Constitution and see that these four claims are established violations of due process in the Colorado Constitution and are not open for opinion but a matter of fact. As it stands without correction the federal court of appeals has forevermore made the lowest crimes of every state equal to the highest as equal and has effectively changed a crime of the lowest level into one two levels higher and "extraordinary" by statute, and with inaction, not affording a protected rebuttal of the sixth amendment. It will affect many future civil cases also protected by the equality clause as the equality clause would be abrogated with the new civil "Separate but Equal" Doctrine replacing the "Substantial Truth" Doctrine as a lower threshold. In the least, it must be acknowledged in the Opinion that is not an equal level crime as previously ascertained in a court of law that does not fit within the equal protection clause of the federal Constitution. The two level crime gap error should be corrected on the Internet by injunction and can be had for less than a nickel, to comply with the living Constitution of the United States as a wrong can still be more righted. City of Borne v. Flores, 521 U.S. 507,517,520

(1997). A Constitutionally proven victory belongs to the petitioner. The petition for an extraordinary writ of certiorari should be granted.

Respectfully submitted,

Daniel James Barnett,
6001 South Yosemite St K201
Greenwood Village, Co., 80111
(303) 796-9687

[1] Evidence of fact by previous findings by verbatim quotation upon penalty of perjury were entered as evidence into this original case from a previous case 99CV391 opinion entered also within *in re Denver v. Denver Publishing Company* U.S. S.C. 01-1367. The court of appeals in that defamation case rule of the Opinion that Barnett plead guilty to harassment, a class three misdemeanor, under Colo. See. Laws 1994, ch. 324, Statute 18-9-111 at 2018, and then (page 5) of the Opinion the court states on the second to last line "In 1995, when he pled guilty to harassment, stalking was a class 1 misdemeanor. This is not equal and a civil rights violation of the equality clause protected by the United States Constitutuion, as a false statement remain on the Internet and must be removed as false and unequal.

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 03-1225

(D. Colorado)

(D.C. No. 01-D-2533)

DANIEL JAMES BARNETT,

Plaintiff-Apellant,

v.

STATE OF COLORADO,

Defendant-Appellee.

Before SEYMOUR, MURPHY, and O'Brien, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir.R, 34.1(G). The case is therefore ordered submitted without oral argument.

Daniel James Barnett, appearing *pro se*, appeals the district court's dismissal of his complaint against the Stae of Colorado for lack

of subject matter jurisdiction and failure to state a claim upon which relief can be granted. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Background

In 1995, Mr. Barnett pled guilty to harassment, a Class 3 misdemeanor, which the plea court described as "almost stalking." In 1998, Mr. Barnett ran for the Republican Party nomination for state representative in District 37, Arapahoe County, Colorado. On May 2, 1998, the Arapahoe County Republican Party convened an assembly to nominate candidates for various offices. The following day, the Rocky Mountain News published an article concerning the assembly, which stated in relevant part: "The District 37 race is to replace Rep. Martha Kreutz ..... Five candidates initially sought the District 37 nomination. But Dan Barnett, convicted in a stalking incident involving one of Kreutz's daughters, failed to show up."

On January 29, 1999, Mr. Barnett filed a defamation complaint against the Rocky Mountain News in Colorado state court. The trial court dismissed Mr. Barnett's complaint but denied the Rocky Mountain News' request for attorneys' fees. Mr. Barnett appealed.

On April 26, 2001, the Colorado Court of Appeals affirmed the dismissal of Mr. Barnett's complaint but remanded the case to the trial court for an award of reasonable attorneys' fees to the Rocky Mountain News. Specifically, the court concluded that although Mr.

Barnett was convicted of harassment, not stalking, the article's use of the term "stalking" to describe his conviction was "substantially true," an absolute defense to Mr. Barnett's defamation claim. Thereafter, Mr. Barnett filed a petition for rehearing to the Colorado Court of Appeals as well as a petition for certiorari to the Colorado Supreme Court. Both petitions were denied.

On December 31, 2001, Mr. Barnett filed a *pro se* complaint against the State of Colorado in the United States District Court for the District of Colorado. In his complaint, Mr. Barnett alleged the Stae of Colorado, "in collusion with the media," was punishing him for a crime for which he was never charged. He also contended the Colorado state courts had improperly ordered him to pay court costs and failed to issue an injunction. In his claim for relief, Mr. Barnett sought the removal of a county court judge, removal of the Colorado Court of Appeals' decision from the Internet and seven million dollars in damages.

The case was referred to Magistrate Judge Craig B. Shaffer for all pretrial proceedings.[1] On March 1, 2002, the State of Colorado filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), repectively. On June 27, 2002, the magistrate judge recommended granting the State's motion to dismiss. Specifically, the magistrate judge concluded the district court lacked jurisdiction under the *Rooker-Feldman* doctrine. *See Disctrict of*

Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-16 (1923). Alternatively, the magistrate judge found Mr. Barnett's complaint failed to comply with Fed.R.Civ.P. 8(1) and the State was immune from suit under the Eleventh Amendment.

Mr. Barnett then filed objections to the magistrate judge's recommendation. On February 13, 2003, the district court overruled Mr. Barnett's objections, adopted the magistrate judge's recommendation, and dismissed the complaint with prejudice.[2]

Thereafter, Mr. Barnett filed a motion for reconsideration, which the district court construed as a Rule 59(e) motion. The district court denied Mr. Barnett's motion on April 30, 2003. This appeal followed.

II. Standard of Review

"We review de novo the district court's dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), and review findings of jurisdictional facts for clear error." *Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001) (citation omitted).

III. Discussion

The district court properly dismissed Mr. Barnett's complaint for lack of subject matter jurisdiction based upon the *Rooker-Feldman* doctrine and the Eleventh Amendment.[3]

It is well established that only the United States Supreme Court has the authority to review final state court judgments. *Feldman*, 460 U.S. at 482. *See also* 28 U.S.C. § 1257. Accordingly, the *Rooker-Feldman* doctrine bars "a party losing in state court ... from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state udgment itself violates the loser's federal rights." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994) (citation omitted). This doctrine "prohibits a lower federal court from considering claims actually decided by a state court and claims 'inextricably intertwined' with a prior state-court judgment." *Kenman Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002) (citing *Rooker*, 263 U.S. at 415 and *Feldman*, 460 U.S. at 483 n. 16). A claim is "inextricably intertwined" with a prior state court judgment if "the state-court judgment *caused*, actually and proximately, the *injury* for which the federal-court plaintiff seeks *redress*." *Id.* At 476 (emphasis is original).

Here, the district court, liberally construing Mr. Barnett's complaint, determined that his true purpose in filing his federal complaint was to redress his dissatisfaction with the outcome of his state court defamation proceedings. We agree. In his complaint, Mr. Barnett attacks the Colorado Court of Appeals' April 26, 2001 decision and seeks an injunction preventing its publication on the Internet due to its falsity.[4] He also challenges the award of attorneys'

fees against him. These claims are "inextricably intertwined" with the prior state court judgments and, in essence, seek impermissible appellate review of the state court judgments by the district court. Accordingly, the *Rooker-Feldman* doctrine applies and the district court properly determined it lacked subject matter jurisdiction over Mr. Barnett's complaint.

Even if Mr. Barnett's complaint could be construed as a constitutional challenge under 42 U.S. C. § 1983, his complaint is nonetheless barred by the Eleventh Amendment. We have repeatedly held that unless a state waives its immunity by consenting to suit or Congress has abrogated the state's sovereign immunity, "the Eleventh Amendment prohibits a citizen from filing suit against a state in federal court." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002) (citation omitted), *cert. Denied*, ____ U.S. ____, 123 S.Ct. 1908 (2003). The State of Colorado has not consented to be sued in this case and the United States Supreme Court has previously determined that Congress' passage of § 1983 did not abrogate the state's sovereign immunity. *See Quern v. Jordan*, 440 U.S. 332, 345 (1979); *Ruiz*, 299 F.3d at 1181.

Relying on *Lapides v. Bd. Of Regents of the Univ. Sys. Of Georgia*, 535 U.S. 613 (2002), Mr. Barnett argues the State of Colorado can be sued in this case and that his constitutional claims outweigh the application of the *Rooker-Feldman* doctrine. *Lapides* is inapplicable here. In *Lapides*, the United States Supreme Court held

that a state's act in removing a lawsuit from state court to federal court constitutes a waiver of its Eleventh Amendment immunity, 535 U.S. at 616. Because Mr. Barnett initiated his lawsuit in federal court, no removal occurred. Moveover, *Lapides* did not address or otherwise limit the *Rooker-Feldman* doctrine.

IV. Conclusion

The district court properly dismissed Mr. Barnett's complaint due to lack of subject matter jurisdiction. Accordingly, we AFFIRM. All pending motions are denied.

Entered by the Court:

TERRENCE L. O'BRIEN

United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 03-1225

(D.C. No. 01-D-2533)

DANIEL JAMES BARNETT,

Plaintiff-Appellant,

v.

STATE OF COLORADO,

Defendant-Appellee.

ORDER

Filed November 3, 2003

Before SEYMOUR, MURPHY, and O'BRIEN, Circuit Judges

Appellant's petition for rehearing is denied.

Entered for the Court

PATRIC[illegible] FISHER, Clerk of Court

By: /Signature/

Deputy Clerk

STATE OF COLORADO

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

KEN SALAZAR

Attorney General

DONALD S. QUICK

Chief Deputy Attorney General

ALAN J. GILBERT

Solicitor General

STATE SERVICES BUILDING

1525 Sherman Street – 5th Floor

Denver, Colorado 802030

Phone (303) 866-4500

FAX (303) 866-5691

October 27, 2003

Mr. Patrick Fisher

Clerk, Tenth Circuit Court of Appeals

Byron White United States Courthouse

1823 Stout St.

Denver, CO 80257

RE: Barnett v. State of Colorado

Case No. 03-1108

Dear Mr. Fisher:

This office has recently received a copy of Appellant's Petition for Panel Rehearing and Petition for Executive Order by President Bush and governor Owens. From my review of this Petition, Appellant raises no issue in the Petition not previously raised and extensively briefed in this matter. Accordingly, Defendant/Appellee chooses to rest on the arguments made in briefs previously filed with the Court and waives the right to file a response to Plaintiff/Apellant's Petition. Defendant/Appellee will not file any response to the Petition unless directed or requested to do so by the Court.

Sincerely,

FOR THE ATTORNEY GENERAL

/Signature/

KATHLEEN L. SPALDING

Assistant Attorney General

Tort Litigation

303-866-3249

303-866-5443 (FAX)

Email: kit.spalding@state.co.us

Cc: Mr. Daniel Barnett

AG File: DOCUMENT3

THE WHITE HOUSE

WASHINGTON

July 15, 2003

Dear Mr. Barnett:

On behalf of Counsel to the President Alberto R. Gonzales, I am writing to acknowledge receipt of your "Appeal and Petition for Executive Order to Governor Owens and President Bush" in the case of *Daniel James Barnett v. State of Colorado.* Your Appeal and Petition requests review of the ruling in this matter by the United States District Court for the District of Colorado, and seeks relief in the amount of $14 million, punitive damages, and an injunction requiring the State of Colorado to remove from the internet a statement that you have been convicted of "stalking."

Please be advised that the President does not have authority to entertain an appeal of a decision of a federal district court, and it would be inappropriate for the President to issue an Executive Order granting the relief you seek against the State of Colorado. Your lawsuit is currently pending on appeal to the United States Court of Appeals for the Tenth Circuit, which is the appropriate forum for

adjudication of your appeal. Thank you for writing, and best wishes as you pursue justice in the courts of the United States.

Sincerely,

/Signature/

Jennifer R. Brosnahan

Associate Counsel to the President

Mr. Daniel Barnett

6001 South Yosemite Street K201

Greenwood Village, Colorado 80111

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 03-1225

(D.C. No. 01-D-2533)

Daniel James Barnett,

Plaintiff/Appellant,

v.

State of Colorado,

Defendant/Appellee

NOTICE OF APPEAL

Before SEYMOUR, MURPHY, and O'BRIEN, Circuit Judges

The petitioner hereby gives notice that a petition for a writ of certiorari will be filed with the United States Supreme Court for civil rights violations detailed in the reply brief and the petition for panel rehearing. The justices omitted key facts necessary to properly understand this civil rights case and failed to address the most relevant VI, VIII, XIV amendments to the United States Constitution as properly before the court. The XIV amendment gives the right to jurisdiction for due process violations without regard to the will of the

state of Colorado as repeatedly upheld by the United States Supreme Court abrogating the XI amendment. The United States Constitution was proven valid while this case is published. A civil rights victory belongs to the petitioner and will prevail in a higher court as previously established by case law and upheld.

Daniel James Barnett

/Signature/

Jan 11, 04

Michael Fitzgerald

2258 Hilary Ave.

Ottawa, Ontario

K1H7J1

Dear Mr. Barnett,

My late father was an American citizen, who served in the United States Army.

This factor prompted my interest in American politics. It also led to my hobby of collecting political buttons and T-shirts, all of which I wear and/or display in my home.

My collection ranges from Presidents and Prime Ministers to School Board Members.

In this regard, i would appreciate it if you could send me such items from your Senate campaign.

Sincerely grateful,

Michael E. Fitzgerald

/Signature/

United States Court of Appeals for the Tenth Circuit

OFFICE OF THE CLERK

Byron White United States Courthouse

1823 Stout Street

Denver, Colorado 80257

(303) 844-3157

Patrick J. Fisher, Jr.

Clerk of Court

Jane B. Howell

Chief Deputy Clerk

November 12, 2003

Mr. Gregory C. Langham

Clerk

United States District Court for the District of Colorado

Alfred A. Arraj United States Courthouse

Room A105

901 19th Street

Denver, CO 80294-3589

Re: 03-1225, Barnett v. State of Colorado

Dist/Ag docket: 01-3-2533

Dear Mr. Langham:

Enclosed for the clerk of the trial court or the named agency, is a certified copy of the order and judgment filed in this case which is issued as the mandate of this court. Se Fed. R. App. P. 41(a). Please file it is in the records of your court or agency.

The clerk of the district court is requested to acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be returned to you at a later date.

Please contact this office you have questions.

Sincerely,

PATRICK FISHER

Clerk

By: /Signature/

Deputy Clerk

PF:jp

Cc: Daniel James Barnett

Kathleen L. Spalding

INDEX

TERMED APPEAL

U.S. District Court

U.S. District Court for the District of Colorado (Denver)

CIVIL DOCKET FOR CASE #: 01-CV-2533

Barnett v. State of Colorado	Filed: 12/31/01
Assigned to: Judge Wiley Y. Daniel	Jury demand: Plaintiff
Referred to: Magistrate Judge Craig B. Shaffer	
Demand: $7,000,000	Nature of Suite: 440
Lead Docket: None	Jurisdiction: US
Defendant	
Dkt# in other court: None	

Cause: 42:1983 Civil Rights Act

DANIEL JAMES BARNETT, *Plaintiff*

Daniel James Barnett

[COR LD NTC] [PRO SE]

6001 South Yosemite Street

#K201

Greenwood Village, CO 80111

v.

STATE OF COLORADO, *Defendant*

Kathleen L. Spalding

303-866-5240

[COR LD NTC]

Attorney General's Office

Tort Litigation Section

1525 Sherman Street, 5th Floor

DC Box 20

Denver, CO 80203

U.S.A.

303-866-5241

Richard Webb

[term 09/09/02]

[COR LD NTC]

Attorney General's Office

1525 Sherman, 5th Floor

DC Box 20

Denver, CO 80203

U.S.A.

303-866-3611

Proceedings include all events.

1:01cv2533 Barnett v. State of Colorado

12/31/01 1 COMPLAINT (Summons(es) issued); jury demand (bm) [Entry date 01/02/02]

12/31/01 — FILING FEE PAID: on 12/31/01 in the amount of $150, receipt #231452. (bm) [Entry date 01/02/02]

1/3/02 2 ORDER by Judge Zita L. Weinshienk declining to take the case and returning case to clerk's office for reassignment. (cc: all counsel); enter date: 1/4/02 (gc) [Entry date 01/04/02]

1/4/02 3 LETTER from clerk to plaintiff advising the case has been reassigned to Judge Daniel pursuant to order [2-1] (gc)

1/15/02 4 ORDER R16, stat,stlmt,pt,mtnrec,pto Case referred to Magistrate Judge Craig B. Shaffer by Judge Wiley Y. (cc: to counsel) (ev)

1/29/02 5 ORDER FOR RULE 16 CONFERENCE by Magistrate Judge Craig B. Shaffer; Rule 16 conference set for 10:30 4/15/02 (cc: all counsel) (ev) [Entry date 01/30/02]

1/31/02 6 WAIVER OF SERVICE of Summons and Complaint by defendant State of Colorado on 1/30/02 by Richard L. Webb US Atty (ev) [Entry date 02/01/02]

2/13/02 7 MINUTE ORDER: by Judge Wiley Y. Daniel Case reassigned to Judge Marcia S. Krieger (cc: all counsel); entry date: 2/13/02 (gc)

3/1/02 8 MOTION by defendant State of Colorado to dismiss (ev) [Entry date 03/05/02]

3/25/02 9 MOTION by plaintiff Daniel James Barnett for partial summary judgment (ev)

3/25/02 10 MOTION by defendant to stay discovery and vacate scheduling conf set 4/15/02 (gc) [Entry date 03/26/02]

3/25/02 11 MEMORANDUM by Judge Marcia S. Krieger referring to Magistrate Judge Craig B. Shaffer the motion for partial summary judgment [9-1] (gc) [Entry date 03/26/02]

3/26/02 12 MEMORANDUM by Judge Marcia S. Krieger referring to Magistrate Judge Craig B. Shaffer the motion to stay discovery and vacate scheduling conf set 4/15/02 [10-1] (pap)

3/27/02 13 ORDER by Judge Marcia S. Krieger regarding Dfts [8-1] motion to dismiss, It is hereby ORDERED that any resp or Obj to Dfts Motion shall be filed with the Ct no later than 3/18/02. Any Reply to the Resp or Obj shall be filed with the Ct no later than 4/2/02 (cc: all counsel); entry date: 3/28/02 (ev) [Entry date 03/28/02]

3/28/02 14 STATUS Update by plaintiff Daniel James Barnett; The related United States Supreme Court case has been assigned case #01-1367, filed by Extraordinary Writ of Certiorari (ev) [Entry date 03/29/02]

4/2/02 15 Objection (RESPONSE) by plaintiff Daniel James Barnett to Dfts motion to dismiss [8-1] (ev) [Entry date 04/03/02]

4/3/02 16 MINUTE ORDER: by Magistrate Judge Craig B. Shaffer; status conf set for 8:30 4/24/02 (cc: all counsel); date: 4/4/02 (ev) [Entry date 04/04/02]

4/24/02 17 MEMORANDUM by Judge Marcia S. Krieger referring to Magistrate Judge Craig B. Shaffer the Dfts motion to dismiss [8-1] (ev) [Entry date 04/26/02]

5/1/02 18 MINUTE ORDER: by Magistrate Judge Craig B. Shaffer; rule 16 conf held on 5/1/02; status conf reset for 9:00 5/13/02 (cc: all counsel); entry date: 5/1/02 (ev) [Edit date 05/08/02]

5/13/02 19 COURTROOM MINUTES of Status Conf by Magistrate Judge Craig B. Shaffer; status conf held 5/13/02 granting Dfts motion to stay discovery and vacate scheduling conf set 4/15/02 [10-1], taking under advisement on the Dfts motion to dismiss [8-1]. The case is stayed pending the resolution of the Motion to dismiss; enter date: 5/14/02 Court Reporter: CBS CV 2002-97 (ev) [Entry date 05/14/02]

5/17/02 20 Notice (MOTION) by plaintiff Daniel James Barnett for hearing Scheduling Planning Conf (ev) [Entry date 05/20/02]

6/27/02 21 MAGISTRATE'S RECOMMENDATION that the State's Motion to Dismiss filed 3/1/02, be GRANTED and this Civil Action be Dismissed by Magistrate Judge Craig B. Shaffer concerning motion to dismiss [8-1]; (cc: all counsel); entry date: 6/28/02 (ev) [Entry date 06/28/02]

7/1/02 22 Supplemental MAGISTRATE'S RECOMMENDATION that Pla's Motion for Partial Sum Jgm be DENIED by magistrate Judge Craig B. Shaffer concerning motion for partial summary [9-1]; (cc: all counsel); entry date: 7/2/02 (ev) [Entry date 07/02/02]

7/8/02 23 OBJECTIONS by plaintiff Daniel James Barnett to Supplemental Magistrate's Recommendation and Recommendation [22-1], [21-1] (ev) [Entry date 07/09/02]

8/2/02 24 CERTIFICATE and Proof of Service by plaintiff for Petition for Rehearing w/ the Supreme Court of the US (filed 6/6/02) (lg)

9/9/02 25 ATTORNEY SUBSTITUION: terminating attorney Richard Webb for State of Colorado and substituting attorney Kathleen L. Spalding (ev) [Entry date 09/10/02]

2/13/03 26 ORDER by Judge Marcia S. Krieger Adopting and Affirming [22-1] – Magistrate's Recommendation Adopting and Affirming [21-1] – Magistrate's Recommendation granting Dfts motion to dismiss [8-1] The Complaint is dismissed with Prejudice dismissing case (cc: all counsel); enter date: 2/18/03 (ev) [Entry date 2/18/03]

2/21/03 27 MOTION by plaintiff Daniel James Barnett for reconsideration order [26-2] Pleading titled: Motion for Reconsideration as the Motion for an immediate injunction has not been ruled upon, petition for executive order, request for an Amicus Curiae for a pro-se Pla in U.S.S.C. case #01-1367, second notice of address change of Pla, and Notice of intent to Appeal if the motion for reconsideration is DENIED to preserve Civil Rights (ev) [Entry date 2/24/03]

2/24/03 28 MEMORANDUM by Judge Marcia S. Krieger referring to Magistrate Judge Craig B. Shaffer the motion for reconsideration order [26-2] [27-1] (ev) [Entry date 02/26/03]

2/27/03 29 MOTION by plaintiff with discovery for leave to include punitive damges in amt allowed by fed law for dfts failure to act in timely manner by public officials, and for order to issuance of jury selection date, and for immediate injunction w/ executive order, and for request for resignation of a public official by governor (gs) [Entry date 03/20/03]

3/18/03 30 MEMORANDUM by Judge Marcia S. Krieger referring to Magistrate Judge Craig B. Shaffer the motion with discovery for leave to include punitive damages in amt allowed

by fed law for dfts failure to act in timely manner by public officials [29-1], referring to Magistrate Judge Craig B. Shaffer the motion for order for issuance of jury selection date [29-2], referring to Magistrate Judge Craig B. Shaffer the motion for immediate injunction w/ executive order [29-3], referring to Magistrate Judge Craig B. Shaffer the motion for request for resignation of a public official by governor [29-4] (pap) [Entry date 03/20/03]

3/21/03 31 MINUTE ORDER: by Magistrate Judge Craig B. Shaffer denying as Moot, Pla's motion with discovery for leave to include punitive in amt allowed by fed law for dfts failure to act in timely manner by public officials [29-1], denying as MOOT, Pla's motion for order for issuance of jury selection date [29-2], denying as MOOT, Pla's motion for immediate injunction w/executive order [29-3], denying as MOOT, Pla's motion for request for resignation of a public official by governor [29-4], terminating motion for reconsideration order [26-2] [27-1]; It is ORDERED that the motions are DENIED as MOOT as this case was Dismissed on 2/13/03 (cc: all counsel); entry date: 3/24/03 (ev) [Entry date 03/24/03] [Edit date 3/24/03]

3/25/03 32 LETTER to court re: petition for extraordinary write (mandamus) (db) [Entry date 03/27/03]

3/27/03 33 ORDER of Recusal by Judge Marcia S. Krieger directing resassignment to another judge (cc: all counsel); entry date: 4/2/03 (bm) [Entry date 04/02/03]

4/2/03 34 LETTER from clerk to counsel advising of reassignment to Judge Daniel re: order [33-1] (bm)

4/3/03 35 LETTER from USCA dated 4/3/03 advising that an order denying motion for leave to proceed w/o prepayment of costs & fees and denying petition for write of mandamus has entered. (gs) [Entry date 04/04/03]

4/4/03 36 MOTION by plaintiff Daniel James Barnett for order for a new management conf date, request for a new Magistrate with the closest working relationship with the new Judge, Notice of understanding and acknowledgement and approval of the recusall with the request for a more senior judge (ev) [Entry date 04/14/03}

4/30/03 37 ORDER by Judge Wiley Y. Daniel denying Pla's motion for reconsideration of 2/21/03 order [26-2] [27-1], denying Pla's motion for order for a new management conf date, request for a new magistrate with the closest working relationship with the new Judge, Notice of understanding and acknowledgement

and approval of the recusall with the request for a more senior judge [36-1], denying motion for order for issuance of jury selection date [29-2] (cc: all counsel); entry date: 5/1/03 (ev) [Entry date 05/01/03]

5/15/03 38 NOTICE OF APPEAL (actually entitled Appeal and Petition for Executive Order to Governor Owens and President Bush) by plaintiff/pro se of order filed 4/30/03 [37-1]; Notice mailed to all counsel on 5/16/03 (mn) [Entry date 05/16/03]

5/16/03 — $100.00 fee and $5.00 fee paid. Receipt No 243484. re: appeal [38-1] (mn)

5/22/03 39 NOTIFICATION by Circuit Court of assignment of Case No. [38-1] 03-1225; USDC to transmit record. (mn) [Entry date 05/23/03]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Judge Wiley Y. Daniel

Civil Action No. 01-D-2533 (CBS)

DANIEL JAMES BARNETT,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

ORDER

THIS MATTER comes before the Court on United States District Judge Marcia S. Krieger's Order of Recusal filed March 27, 2003. The following motions are pending before the court: Plaintiff's Motion for Reconsideration filed February 21, 2003[1]; Plaintiff's Motion for Discovery and other relief filed March 17, 2003; and Plaintiff's notice of Understanding and request for other relief filed April 4, 2003. For the reasons set forth below, Plaintiff's request for reconsideration is DENIED and the remaining motions are DENIED AS MOOT.

On February 21, 2003, Plaintiff filed a motion to reconsider Judge Krieger's February 13, 2003, Order affirming and adopting Magistrate Shaffer's recommendation to dismiss this case as barred by the *Rooker-Feldman* doctrine. Although Plaintiff has captioned his motion as one for "reconsideration," the Court will treat this motion as one filed under Rule 59(e) because Plaintiff filed the motion within 10 days of Judge Krieger's Order dismissing this case with prejudice.[2] See *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995); see also *van Skiver v. United States*, 952 F.2d 1241, 1242 (10th Cir. 1991) (the Federal Rules of Civil Procedure do not recognize a "motion to reconsider"). Under Rule 59(e), there are three grounds that justify reconsideration: (1) an intervening change in the controlling law: (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Brunswick v. Brumakr Corp. V. Samson Resources Corp.*, 57 F.3d 941, 944 (10th Cir. 1995).

While the instant motion is not plagued by the same "prolixity and incoherency" as his previous motions, the Plaintiff has failed to set forth a proper basis for relief under Rule 59(e). The Plaintiff has provided this Court with no new evidence or recently promulgated authority to merit the reconsideration of Judge Kreiger's Order. Further, he has not identified a clear error or manifest injustice that warrants correction by this Court. Rather, Plaintiff simply contends that Magistrate Shaffer and Judge Krieger were wrong in dismissing Plaintiff's Complaint with prejudice for the same reasons

he argued previously. A disagreement between the Court and the litigant and merely requesting that a court rethink a decision it has already made are clearly improper bases for seeking relief under Rule 59(e). *See servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (in a Rule 59(e) motion, it "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing"). I have reviewed Judge Krieger's Order dated February 13,2003, Magistrate Shaffer's recommendation and supplemental recommendation filed June 27 and July 1, 2002, as well as the Plaintiff's various submissions. Since I agree that the *Rooker-Feldman* doctrine is applicable in this case and Judge Krieger correctly dismissed this case with prejudice, it is

ORDERED that Plaintiff's Motion for Reconsideration filed February 21, 2003, is DENIED. It is

FURTHER ORDERED that Plaintiff's Motion for Discovery and other relief filed March 17, 2003 and Plaintiff's Notice of Understanding and request for other relief filed April 4, 2003, are hereby DENIED AS MOOT.

DATED this 29th day of April 2003.

BY THE COURT:

/Signature/

Wiley Y. Daniel

United States District Court Judge

(Footnotes)

[1] This case was originally assigned to the Honorable Zita L. Weinshienk. Judge Weinshienk, a senior judge, declined the case and the case was re-assigned to the Honorable Wiley Y. Daniel. On February 12, 2002, pursuant to the general plan for reassignment of cases, Judge Daniel reassigned the case to the Honorable Marcia S. Krieger. On March 26, 2003, Judge Krieger recused herself from the case. The case was re-assigned to Judge Daniel on April 2, 2003. Contrary to Mr. Barnett's argument on appeal, Judge Daniel never recused himself in this case.

[2] On March 25, 2003, Mr. Barnett filed a motion for write of mandamus to this Court, which was denied on April 3, 2003.

[3] Because the district court lacked subject matter jurisdiction over this case, this Court need not address whether the district court correctly found that Mr. Barnett's complaint failed to comply with Fed.R.Civ.P. 8.

[4] It appears that the cruz of Mr. Barnett's argument is that the Colorado Court of Appeals' April 26, 2001 decision falsely states he was convicted of "stalking." This argument is factually incorrect. The Colorado Court of Appeals' decision correctly states he was convicted of harassment.

[1] Judge Krieger's March 27, 2003, Order of Recusal incorrectly identifies this motion as one that had been ruled on by United States Magistrate Craig B. Shaffer's minute order dated March 21, 2003.

[2] The Court's treatment of this motion as one filed under Rule 59(e) is further supported by the fact that the clerk's office did not enter judgment before Plaintiff filed his motion to reconsider.

In re DAN BARNETT

SUPREME COURT, UNITED STATES OF AMERICA

On Certiorari to the Supreme Court of the United States of America

Case of the Supreme Court of the State of Colorado Case No. 01SC620

Case of the Appeals Case No. 00CA0642

District Court, Arapahoe County, 99CV391

DAN BARNETT, *Petitioner*,

v.

DENVER PUBLICING COMPANY d/b/a

ROCKY MOUNTAIN NEWS INC., *Respondent*

Dan Barnett

6565 South Syracuse Way, Suite 404

Englewood, CO 80111

303-796-9687

PETITION FOR AN EXTRAODINARY WRIT OF CERTIORARI

JURISDICTION

The Supreme Court has jurisdiction under the following Sections of Federal Civil Procedure and Rules along with violations of the Federal Constitution as set forth in Exhibit 2 and 3. Section 1331 Federal Question, 1343 Civil Rights, 1361 Action to compel an officer or agency of the United States to perform his duty, 1357 Injuries under Federal law, and Rule 20 where a political candidate has been libeled and immediate action is mandatory.

A BRIEF NATURE OF THE CASE AND QUESTIONS TO BE REVIEWED

The Petitioner was running for state house district #37 in 1998. The Defendant wrote and article relying on rumor as a fact that the Petitioner has been convicted of a crime inferred as a fact established by the Opinion to the public a worse crime by criminal classification by statue as an *extraordinary risk of violent harm to society,* which does not match that of the lowest classification of misdemeanor of the state as he was charges in 1995 in the most minimal argument. The Petitioner is a Realtor by profession.

The Petition has been denied his rights as set forth in the Constitution of the state of Colorado by the Defendant and has been denied basic civil liberties. The Colorado court system has cheated the Petitioner out of victory at every turn to cover-up irregularities and illegal

rulings of the court which will surely end in sanctions. The state of Colorado failed to issue an obvious injunction as properly set forth within pleadings. (Exhibit 2) The state Writ of Certiorari and (Exhibit 3) the state Reply in Support of the Write of Certiorari have enough evidence to prove the case of the Petitioner by matter of fact and law of the Constitution of the State of Colorado and hold the jurisdiction of the United States Supreme Court within these exhibits with reference to the United States Constitution. The Petitioner has also filed suit against the state of Colorado for seven million dollars in regards to this matter for failing to follow the Constitution and issue the removal of the statement from the Internet, obstructing justice, and as the ruling now stands with incorrect facts established by the Court of Appeals, wrongful imprisonment in Denver Federal Court Case # 01-2-2533.

The Petitioner has never been charged with the crime the Court of Appeals labels as a matter of fact, nor has the petitioner ever been charged at the same level of crime under the state of Colorado by severity of crime classification. The Plaintiff's reputation was injured beyond facts. Please note the Opinion refers that the defendant in 1995 was almost charged with the crime the Defense refers. The Court of Appeals disturbingly ruled "almost charged" is the same as convicted. Furthermore, it is not possible to know for sure that the crime was not a felony as the date of conviction was omitted in the

article. The Defense never has legally checked out the file to which purported evidence came from until after the article was written. The Petitioner stands firm that the exhibits will prove the rights of the Petitioner were abused. The Court of Appeals left seven errors (A-G) that need review and correction. The Defendant refuses to remove the false conviction from the website and the state of Colorado failed to force the removal and state law shows that Per Se Libel of a public official must be dealt with immediately and an injunction granted. The Petitioner has also ordered papers to run for United States Senate as a representative of Colorado in 2004 and has not ruled out a possible Presidential run in his lifetime. The Petitioner is currently an elected voting state delegate and a voting elected congressional delegate and has been invited the last three years to participate in the Governor's leadership program retreat. The Petitioner request monetary damages as set forth within the original Complaint. The media is attempting to convict in the eyes of the community by collusion with the civil courts, a person of a crime bypassing the criminal courts. If such a crime as the Opinion refers as a matter of fact would have occurred, surely such a charge would have been filed. This did not happen.

In conclusion the Court of Appeals did not address numerous issues presented for review and the Supreme Court turned its back (Exhibit 1). The Petitioner requests justice to be served in accordance with the

law. As it stands, the state wants the Petitioner to pay court costs for the court's errors and the guilt of Denver Publishing Companies d/b/a Rocky Mountain News Inc. Without a corrected ruling the Petitioner could never refuete a false conviction of a crime the Court of Appeals identified as a fact. The state cannot have a fact both ways. And injunction is mandatory. A lower crime can never be fabricated into a higher crime of 2 classifications + a sentence enhancer without being first charged with such a crime in the most minimal argument. That process would have occurred in a criminal court with Miranda warning but there has the Petitioner was never even charged with that crime. The Petitioner also wants the published "Non-Published" Opinion removed from the Internet as seven errors remain and it infers a worse crime. It is an outrageous perversion of justice.

Respectfully submitted,

Dan Barnett

Pro Se

/Signature/

EXHIBIT 1

Supreme Court, State of Colorado

Two East 14th Avenue

Denver, Colorado 80203

Certiorari to the Court of Appeal, OOCA642

District Court, Arapahoe County, 99CV391

Case No. 0130829

Petitioner:

DAN BARNETT,

v.

Respondent:

DENVER PUBLISHING COMPANY, d/b/a ROCKY MOUNTAIN NEWS, INC.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 17, 2001.

Cc:

Dan Barnett

6565 S. Syracuse Way, Ste. 404

Englewood, CO 80111

Marc D. Flink

Baker & Hostetler, LLP

303 E. 17th Ave., Ste. 1100

Denver, CO 80203

Clerk of Court, Court of Appeals

Honorable Timothy L. Fasing

Arapahoe County District Court

7325 South Potomac Street

Englewood, CO 80112

Clerk of District Court

Arapahoe County District Court

7325 South Potomac Street

Englewood, CO 80112

EXHIBIT 2

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue

Denver, CO 80203

On Certiorari to the Court of Appeals

Case of Appeals Case No. 00CA0642

DAN BARNETT,

Petitioner,

v.

DENVER PUBLISHING COMPANY d/b/a ROCKY MOUNTAIN NEWS INC.

Respondent,

Case No 01SC620

Dan Barnett

6565 South Syracuse Way, Suite 404

Englewood, CO 80111

(303) 796-9687

PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

I. QUESTIONS PRESENTED FOR REVIEW 1

II. REFERENCE TO REPORTS 2

III. GROUNDS FOR JURISDICTION 2

IV. STATEMENT OF CASE 3

V. ARGUMENT 4

A. The Court of Appeals erred in not granting an injunction to remove the false conviction from the Internet and has allowed for a perpetuation of human rights violation in which the State of Colorado will be enjoined as a Defendant at the Federal level if the major offensive problem is not corrected by the Supreme Court 5

B. The Court of Appeals erred in not remanding the case to be set for trial again because the court overlooked the fact the burden placed upon the Petitioner had satisfied the elements of proper relief. **C.J.I.22:17, Rule 8** 5

C. The Court of Appeals violated the Constitution as set forth in the Amendment to the Petition for Rehearing, (***Colorado Constitution Art. 2, Section 10, 2000***), because a jury trial was not entitled by law 6

D. Considering the Motion for Dismissal was improvidently granted, did the Court of Appeals not properly consider Plaintiff-Appellant's

Motion for Summary Judgment and issue Partial Summary Judgment on the lower liability of the false conviction and remand for the higher level of community belief the Complaint properly addressed, within the community in regards to the complaint of District Court case 99CV391 or in the alternative should have directed the lower court to re-address the issue of Summary Judgment, **Rule 57** 8

E. The Court of Appeals did not address a change of venue request 9

VI. CONCLUSION 9

Appendices:

I. **Appendix 1**, is Appendix B in the Opening Brief of Plaintiff-Appeal in the Court of Appeals showing the case had already been scheduled for a (2) day trial for October 2000.

Plaintiff had been working towards preparations for the Trial Status Conference scheduled for 10 A.M. September 22, 2000.

II. **Appendix 2**, Colorado Court of Appeals decision of April 26, 2001

III. **Appendix 3,** Order Denying Petition for Rehearing, August 16, 2001 routhly 110 days after the decision by the Court of Appeals.

IV. **Appendix 4**, Directions for the clerk to contact the Attorney General regarding a Constitutional violation. **Rule 44** Page 1571

V. **Appendix 5,** Declarations of basic human rights and relevant United States Amendments.

U.S. Constitution Amendment XIV (1868) Section 1

U.S. Constitution Amendment VI (1791)

United Nations Universal Declaration of Human Rights Article 11 Part 2, and Article 10

CASES CITED

Abrahamsen v. Mountain Tel. And Tel. Co... 177 Colo. 422, 494 P.2d 1287 (1972) 9

Left Hand Ditch Co. v. Hill, 933 P. 2d 1 (Colo. 1997) 7

Fluid Technology, Inc. v. CVJ Axles, Inc. 964 P.2d 614 (Colo. App. 1998) 4,9

Lockett v. Garrett, 1 P.3d 206 (Colo. App. 1999) (Summary Judgment) 6,8,10

Smiley's Too, Inc. v. Denver Post Corp. 935 2d 39 (Colo. App. 1996) 7

Lewis v. McGraw-Hill Broadcasting Co., 832 P.2d 1118 (Colo. App. 1992) 11

Lane v. Arkansas Valley Publishing Co., 675 P. 2d 747, 750 (Colo. App. 1983) 5

Simonson v. United press International, Inc. 654 F. 2d 478 *7th Cir. 1981) 6

Macleod v. Miller, 44 Colo App. 313, 612 P.2d 1158 (1980) 3

Read v. Phoenix Newspaper, Inc. 819 P2d 939 (Ariz. 1991) 6

Brooks v. Jackson, 813 P 2d 847 (Colo. Ap. 1991) 5

Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972) 4

Churchy v. Coors Company, 759 P. 2d 1336 (Colo. App. 1988) 6

Heller v. Bianco, 244 P. 2d 757 (Cal. App. 1953) 5

Walton v. State, 968 P. 2d 636 (Colo. 1998) 3,12

Lucas v. District Court, 140 Colo. 510, 345 P 2d 1064 (195)12

Miles v. Ramsey, 31 F. Supp. 2d 869 (D. Colo. 1998) 4

Bolduc v. Bailey, 586 F. Supp. 896 (D. Colo. 1984) 11

STATUTES AND OTHER AUTHORITIES

Colorado Criminal Code Title 18 5

C.R.S. 18-9-111 (5A) (1995) 3

C.J.I. (2d ed.) 3:2 1,12

C.J.I. (2d ed.) 22:17 5

C.J.I. (2d ed.) 22:14 4,7

C.R.S. Rule 49 P.1573 2

C.R.S. Rule 44 P. 1571 3

C.R.S. Rule 65 P. 353 1

C.R.S. Rule 97 1,3

C.R.S. Rule 57 1,5,8

C.R.S. Rule 46.6 12

C.R.S. Rule 53 2

C.R.S. Rule 8 3,4

C.R.S. Rule 21 8,9

C.R.S. Rule 45 9

Colorado's (Second) Restatement of Torts 581 A(1977) 7

Colorado Constitution Art. 2, Section 10 (2000) 6

U.S. Constitutional Amendment 1 3,5,10

I. QUESTIONS PRESENTED FOR REVIEW

A. Why the jury was not allowed as a matter of right protected by the Colorado Constitution and was properly asked and paid for? **C.J.I. 3:2**

B. Why an injunction was not granted as already proven to be at least 2+ (a sentence enhancer) additional levels of crime worse as a (matter of fact) than the Petitioner has ever been convicted of and also labeled by the State statue as an **extraordinary harm to society**? It is actionable libel Per Se. **Rule 65**, An injunction was mandatory.

C. Did the Court of Appeals misapply laws from Wisconsin and Arizona that were not relevant as a defense and different from this case as both were the same classification of crime and not different levels with two additional necessary elements for the case being plead today, and also how can a failure to state a time of conviction not matter?

D. Considering the Motion for Dismissal was improvidently granted, did Court of Appeals not properly consider Plaintiff-Appellant's Motion For Summary Judgment and issue Partial Summary Judgment on the lower liability of the false conviction and remand for the higher

level of community belief the Complaint properly addressed, within the community in regards to the complaint of District Court Case 99CV391 or alternatively directed the lower court to re-address the issue of Summary Judgment, **Rule 57**?

E. Did the Court of Appeals not address a change of venue request?

F. Did the Court of Appeals improperly ignore that the Plaintiff-Appellant was not afforded the Constitutional right to request a new judge before judgment at the Discrtic Court level as argued in the Court of Appeals and incorporated in the Court of Appeals, **Rule 97**?

G. Did the Court of Appeals err in not remanding the case to the District Court for improvidently granting a Motion to Dismiss as recklessness was established along with a properly stated claim upon which relief can be granted?

II. REFERENCE TO REPORTS

This Petition for *Certiorari* concerns the decision of the Court of Appeals Case No. 00CA0642 from Arapahoe County District Court Case No. 99CV391 with the most honorable Gerald J. Rafferty presiding as of 1-4-2000, until switched without notice or consent to honorable Timothy L. Fasing.

III. GROUNDS FOR JURISDICTION

C.R.S. Rule 49 p. 1573 gives grounds for Supreme Court review for the following reasons.

A. Where the District of Superior Court has decided a question of substance not heretofore determined by this court as the Court of Appeals is attempting to circumvent the legislature and create new law in regards to criminal classification.

B. Where the Court of Appeals or District Court has decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court or the body of the legislature, or the Governor, or Federal Courts, or the United Nations.

C. Where the court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a lower court as to call for the exercise of the Supreme Court's power of supervision. **Rule 53.**

D. Where the Petitioner is currently an elected public figure as a State and Congressional Delegate to represent the views of his community and three years in a row invited to participate in the Colorado Republican Leadership retreat as an emerging leader and eventually a possible candidate to represent Colorado in other capacities, and to hear this case is a matter of public concern; and as an issue for other Statesmen in the foreseeable future, and without an injunction would open up to liability the State of Colorado for parasitic damages and to be enjoined as a Defendant at a Federal Court level for failing to follow the Constitution of Colorado and the United States, and issue an injunction, by allowing for a human rights violation to continue. Walton v. State 968 P.2d 636 (Colo. 1998). The injunction should

have been immediate at the time the Court of Appeals ascertained the crime in the Opinion as a (matter of fact) with a crime difference acknowledgment. Macleod v. Miller, 44 Colo. App. 313, 612 P.2d 1158 (1980).

E. Petitioner was denied due process as outlined within Opening Arguments by the Plaintiff-Appellant. **Rule 97**.

F. **Rule 44** Page 1571 (See Appendix 4 for clerk instructions).

G. ***U.S.C.A. Amendment 1.*** The Public has a right to know the facts and not the "Almost facts."

IV. STATEMENT OF THE CASE

1. The Petitioner won this case prima facie on the merits and the Court of Appeals overlooked, or misapprehended the facts. The fact that that crime of which the Opinion labeled the conviction is not sufficient to overcome the Defense's plead strategy of "failure to state a claim upon which relief can be granted." **Rule 8** The Defense never showed such a conviction that the Court of Appeals labeled as a (matter of fact), and denied the Petitioner basic human rights. The District Court judge in a minimal liability argument must have not looked at C.R.S. 18-9-111 (5A) (1995). There are two additional elements. (1) A threat as to make a reasonable person to be in the fear for the person's life, and (2) threat repeated on more than one occasion. The Court of Appeals just ignored this information.

2. The Petitioner could have won the election he was running for if the reporter had correctly labeled and dated the correct 1995 crime as to which the Defense refers to as a worse crime. It was unfair, and the damage can never be completely undone. The Plaintiff was running for office (H.D. #37) in 1998 by Petition, and the Defense accused the Plaintiff of being convicted of a crime without a time frame element, essentially by reporter, editor, attorneys, and civil court bypassing criminal court. The court must accept all facts pled in the complaint as true. This was not done. Opening Brief of Plaintiff-Appellant (Page 8) shows that **he Relief to the defense should be granted if the defense can prove that information used to write the article came from a reliable legal source and not something like tarnished, political hearsay." Rule 8**, in which the Court of Appeals labeled as a (matter of fact). There was no State computer glitch or wrongly labeled file. Fluid Technology, Inc. v. CVJ Axels, Inc., 964 P.2d 614 (Colo. App. 1998) was not properly used as a guide by the Court of Appeals. A jury trial was necessary to establish liability, and recklessness, and damage award calculations. The burden is on the Defendant to prove the conviction is true. Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972). This was not done. It was not true and impossible to be substantially true as legally incongruent. The Plaintiff-Appellant has never been convicted with this crime, nor charged with it. The Appeals Court did not show proper respect to the fact that the Defense failed to show cause for a disqualification on the

merits alone. The statement is false as a (matter of fact) and not opinion as stated by the Court of Appeals. **C.J.I. 22:14.** It has caused him to be feared and "shunned" by society with dozens of witnesses to testify to the depth of the damage to that effect. Miles v. Ramsey, 31 F. Supp. 2d 869(D. Colo. 1998).

V. ARGUMENT

A. The Court of Appeals erred in not granting an injunction to remove the false conviction from the Internet and has allowed for a perpetuation of a human rights violation in which the State of Colorado will be enjoined as a Defendant at the federal level if the major offensive problem is not corrected by the Supreme Court.

The Opinion agrees that recklessness was satisfactorily established. Heller v. Bianco 244 P. 2d 757 (Cal. App. 1953) is a landmark ruling for liability and Internet retractions. The Court of Appeals has also asserted erroneously that relief cannot be met with regards to a felony as witnesses believe, in the elevated liability scenario in District Court, Case 99CV391 as properly incorporated in the Appeal, by exact working of the Complaint. Either way a 3rd degree misdemeanor never matches a 1st degree misdemeanor + (a sentence enhancer) for a public fear element, or that of a felony. Thus, the Court of Appeals erred in never issuing obvious injunctive relief and misapplied Brooks

v. Jackson 813 P.2d 847 (Colo. App. 1991) in regards to damage awards and should have rather focused on **Rule 57 (F)**. The Supreme Court has no choice but to administrarily issue an injunction. The Petitioner is just asking for a fair and accurate re-written statement in the place of the incorrect statement. The finds of Lane v. Arkansas Valley Publishing Co. 675 P. 2d 747, 750 (Colo. App. 1983) of open debate and the ***1st Amendment*** rights are not legally diminished in any way and is not an effective defense for not rewriting the statement with a proper time frame. The truth is always the best remedy. It shouldn't take more than five minutes by the Defense's computer expert.

B. The Court of Appeals erred in not remanding the case to be set again for trial because the court overlooked the fact the burden placed upon the Petitioner had satisfied the elements of proper relief. C.J.I. 22:17.

Colorado Criminal Code Title 18. The Defense did not show any crime which the Court of Appeals ruled was at least 2 classifications of crime higher + (a sentence enhancer) by law with additional classification as an **extraordinary risk of harm to society** (Page 5, last paragraph) which involves the additional elements of a threat as to cause one to fear for life and a repeated threat. The Defense has never shown that 1st degree misdemeanor or worse. The judgment must be modified and Partial Summary judgment should be granted

Lockett v. Garrett, 1 P. 3d 206 (Colo. App. 1999), or be remanded for trial for further proceedings as to the greater level of damage ignored by the Court of Appeals to be shown with witnesses under sworn testimony that will not agree to, but something much different and more serious. This will be shown in trial. The Defense never successfully showed such a conviction, because there isn't one, nor is there one that is similar or even close by severity by crime level.

C. The Court of Appeals violated the constitution as set forth in the Amendment to the Petition for Rehearing, (Art. 2 Section 10, 2000), because a jury trial was not entitled.

The Court of Appeals erred in not reversing the Trial Court, by violating the ***Colorado Constitution*** (Art. 2, Section 10, 2000) "In all suits and prosecutions for libel the truth thereof may be given in evidence, and the JURY, under the direction of the court shall determine the law and the fact. Churchy v. Coors Company 759 P. 2d 1336 (Colo. App. 1988)

1. Read v. Phoenix Newspaper, Inc. 819 P. 2d 939 (Ariz. 1991) was incorrectly applied by the Court of Appeals in their logic because in 1974 in the State of Arizona there was only one classification of misdemeanor. Thus, both crimes in that case were exactly the same level and effective as support of equality, but entirely different and irrelevant to the case before you today. They were the *exact* same level.

2. Simonson v. United Press International, Inc., 654 F. 2d 478 (7th Cir. 1981). The Court summarizes that the dispatch was in no manner made false by substituting the word for the exact legalism. In 1977 Wisconsin law notes that "rape" is also considered 2nd degree sexual assault. "Sexual contact of sexual intercourse with another without consent of that person by the use of threat or force." The youth pled guilty to second degree sexual assault. As anyone can see rape is exactly second degree assault by Wisconsin Statute. The crimes are *exact* legalisms. This is entirely different than the case of the Petitioner, pleading here today. Furthermore, the Wisconsin Court ruled the statement needs to be both defamatory and false. Defamation by criminal label is actionable Libel per Se. There has never been a crime the Court of Appeals refers, or in other words the conviction was factually false. The higher crime can never be misapprehended by any intelligent person of the lower crime. By statue it is legally impossible. Therefore, the Court of Appeals misapplied case law and the Defense has never shown by Exhibit or otherwise that a 1st degree misdemeanor as referred to in the Opinion has been committed. It is not true. **C.J.I. 22:14.** The Court of Appeals cited Smiley's Too, Inc. v. Denver Post Corp. 935 P.2d 39 (Colo. App. 1996) which contradicts the Court of Appeals Opinion (matter of fact) label by statute. The Court of Appeals should have rather relied upon Colorado's (Second) Restatement of Torts 581 A(1977) which states liability for defamation should be granted if

false. If this would have been done Left Hand Ditch Co. v. Hill, 933 P. 2d 1 (Colo. 1997) would have actually supported the Plaintiff. (1) The statement is false and is a (matter of fact). (2) The Petitioner has never been convicted of the crime the Court of Appeals ruled it was (Page 5, last paragraph).

2. The briefs satisfied the Court of Appeals which ruled in the Opinion (Page 5 Line 1,2) that recklessness was adequately formed within the complaint. It was an unprivileged publication to write that the Plaintiff was convicted of something he has never even been charged. The Petitioner never asked for the sealed court files because an accurate description can be made without recklessly making it appear as much worse crime as the Defense did.

3. The obvious existence of harm to reputation by false criminal label to the Plaintiff what the labeled statues as an **extraordinary harm to society**, carrying a much greater "Sting" anything by hearsay, or how the Defendant had over (17) reasons why the Defendant should have serious doubts. (2) And if this action was (Recklessness with disregard to truth or falsity) which is further compounded by failing to remove the false (matter of fact) statement as established by the Court of Appeals. If the Defense does not respond to these set upon facts established by the Court of Appeals, the Supreme Court should automatically grant Partial Summary Judgment Abrahamsen v. Mountain Tel. And Tel. Co. 177 Colo. 422, 494 P. 2d 1287 (1972) to eliminate time and expense of factual pleadings.

E. The Court of Appeals did not address a change of venue request.

The Appellee requested the case be moved to any other county besides Arapahoe County. **Rule 21** (Page 4, last two lines) Opening brief of Plaintiff-Appellant and the Petitioner requests remand into any other county other than where the House District the Plaintiff was running for was located, and lower court and the Court of Appeals have shown cause with Constitutional violations established within these briefs for such appropriate action.

CONCLUSION

Fluid Technology, Inc. v. CVJ Axles, Inc., *supra*, does not support the decision of the Court of Appeals because it ignored statements in the Complaint entirely, and they must consider everything as true. Witnesses that definitely will be subpoenaed to testify that there is a belief that a felony conviction occurred roughly 1,034 days after the Defense's purported "almost" conviction were shown within the body of the complain of Case 99CV391 in Arapahoe County District Court. **Rule 45**.

1. Witness #1 John Emery (303) 947-2721 Real Estate Broker/Owner, 8333 W. Crestline Ave., Littleton, CO 80120
2. Witness #2, Betty Wotring, (303) 734-4567, Centennial City Council, Aurora, CO 80120
3. Witness #3, Martha Kreutz, (303) 741-4681, 6023 S. Bellaire Way, Littleton, CO 80121.

With prima facie evidence with Witness #1, #2, and #3 as samples with roughly 85 other respected citizens within the body of the complaint, whom will not believe what the Court of Appeals is saying that they believe. They have never been deposed as requested by the Defense as the trial was still months away. The Court of Appeals cannot possibly know the truth. Furthermore, with near certainty *every* ruling State Senator and State Representative will not agree with the ruling of the Court of Appeals, nor the District Court and all work very hard to create laws for the judiciary to recognize and follow. The Defendant's ***1st Amendment*** rights are not being diminished in any capacity because they can label it any way they see fit as long as it is equal to 3rd degree misdemeanor and not something much higher and worse as was done. The file is currently open for a full and robust debate as are any and all other means of collecting information on convictions. The Petitioner is just requesting the Defense write it in a legal and fair way. The Court of Appeals (Page 5) erred in applying the standard of "Almost" instead of "fact" for the one and only Exhibit entered by the Defense in Case 99CV391 and did not address that the so called evidence presented by the Defense was never looked at before the article was written as stated in the body of the Complaint of Case 99CV391, that can be proven at jury trial if necessary. "Almost" shown within these pleadings is insufficient as a "matter of fact and law." The "Almost" proof is the only evidence ever entered at any time by the Defense and is not sufficient. Findings of Lockett v.

Garrett, *supra*, surround "disregard to truth or falsity" and was a question for the jury for this heightened burden of being a public figure. It is also inadmissible after proven at trial that it was not used to write the article, although not necessary to show recklessness. The purported evidence shows the date of a different conviction (8) times, the Statute of Conviction (30) times, and the level of crime more than (6) times, but it was rather dug up afterwards by their attorneys. These (17) reasons, would support findings of Lewis v. McGraw-Hill Broadcasting Co., 832 P.2d 1118 (Colo. App. 1992) of "probably falsity" and was a question for the jury to decide. In either scenario, reckless disregard for the truth is exchangeable wording for malice with the additional burden of proof as justification for punitive damages by Colorado law, Bolduc v. Bailey, 586 F Supp. 896 (D. Colo. 1984). In regards to the Court of Appeals claim of both crimes being unwanted behavior, I don't of any crime that is wanted and that is why it is a crime. The Court of Appeals showed no legal jurisdiction or case for this statement and deserves to be sanctioned for failing to issue the injunction. It is cruel and unusual. Without this corrected ruling the petitioner would be unable to refute an incorrect and much worse crime. It is wrong, and herein was proven to be an incorrect ruling. Other reporters in the future will wonder what happened to such a conviction since they cannot find such a conviction or will they just look at the website as a matter of false truth and perhaps publish again if not removed. The appeals ruling was very unhealthy for civil

rights. The failure of the courts to not act immediately on the injunction sets a disturbing and dangerous precedence with a slow erosion of human rights. This case when ruled upon by the Supreme Court will issue new legal precedence as to retractions as this Libel case is unlike any other ever heard in this county, as being a different level of crime even in the minimum liability argument. It is entirely false. It is correctable. A higher crime by label of this and other sorts never can be lowered by label by any reasonable person. It is much worse and the petitioner is sure any jury would easily agree. There are two additional necessary elements of difference for such a conviction. The Petitioner/Appellant and Cross-Appellee/Plaintiff has won this case as the laws under the State of Colorado within briefs at both the District Court level and in the Court of Appeals, with prima facie evidence. The Petitioner has rock solid (matter of fact) witnesses that were never addressed for additional liability. The Petitioner also requests an additional $300 for filing in the Court of Appeals and the Supreme Court and accrued interest to cover this time frame as well. The Petitioner has no legal training and has only studied the law to clear his name of this horrid and offensive criminal label and therefore, cannot ask for attorney fees. The Supreme Court should also order the Defense to promulgate to all media outlets that an injunction was issued so as to help stop foreseeable future damages. Venit et dicit; Victory in regards to the injunction belongs to the Petitioner by law. The Supreme Court should hear this case as an

issue of public concern and modify the Judgment of the Court of Appeals. A jury should be summoned with regards to recklessness and liability with further proceedings to determine award amount due to the Plaintiff with interest calculations. It should be noted as well the Defense did not appeal the Amendment to the Complaint is Case 99CV391, if the Supreme Court decides to entertain Summary judgment in entirety Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959). The Petitioner also requests oral argument **Rule 46.6** The Petitioner has no moral choice but to move forward with this Writ, as matter of law, fact, public concern with Constitutional violations, and respectfully requests to Supreme Court to hear this case as a safety net for all Statesmen and women of the United States so that Barnett v. Denver Publishing Company d/b/a Denver Rocky Mountain News will be used as a means to prevent media abuse and as a question that should best addressed by the assembly Walton v. State, supra, and not the judiciary by usurping the Constitution, as a battleground case for Internet injunctions, U.S. Criminal Code, and others wrongfully Libeled.

Respectfully Submitted,

/Signature/

Dan Barnett, Pro Se

APPENDIX

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO

Case. No 99CV391, Division 5

Order Regarding Cases Set for Trial

Dan Barnett, Plaintiff(s),

v.

Denver Publishing Company d/b/a Rocky Mountain News,

Defendant(s).

The party setting this matter for trial is hereby ordered to provide a copy of this order to all parties of record within five (5) days from the receipt of this order and to provide to the court a certificate of that service within ten (10) days.

1. Trial Call/Trial Status Conference

A. For all jury trials and all court trials scheduled on a Monday (or a Tuesday following a Monday holiday), a mandatory Court appearance for trial counsel will be scheduled for 10:00 a.m. approximately 10 days before the first day of trial. This will be a trial status conference. The Trial Management Order shall be filed at least 20 days before this conference.

B. Lead counsel and pro se litigants must appear for the trial status conference.

C. On the Friday morning before the first day of trial, counsel for those trials remaining on the docket for the following week shall advise the Court by telephone as to whether their case remains ready to proceed to trial.

2. Filing Deadlines.

A. *Motions.* An original and a copy of all pre-trial motions, *together with forms of order and sufficient stamped self-addressed envelopes for all parties*, must be filed in accordance with C.R.C.P. 16 and shall be designated in the Trial Management Order pursuant to C.R.C.P. 16(c)(1) (III). Pursuant to C.R.C.O. 56 (c) motions for summary judgment shall be filed not later than 75 days before trial and cross motions for summary judgment shall be filed not later than 60 days before trial. *Facsimile filings are not accepted unless pre-approved by the court. Facsimile filings greater than 10 pages will not be accepted.* **Briefs shall not exceed 10 pages in length, exclusive of tables and appendices, without prior court approval.** No surreplies or supplemental responses shall be filed except to cite new, previously unpublished authority.

B. *Court Settlement Conferences.* All requests for ADR services shall be referred to Multi Door Court Services at 303-649-6275.

3. Experts.

A. All cases are subject to the expert witness provisions of C.R.C.P. 16 (b)(1)(II)(B) and (c)(1)(VI) and C.R.C.P. 26 (a)(2) and (a)(4).

B. In all cases, reports or summaries of expert witnesses' testimony must be provided for all experts in a manner consistent with C.R.C.P. 26(a)(2).

4. Attorneys shall confer with each other. Pursuant to the provisions of C.R.C.P 16 and C.R.C.P. 121 1-12 (1) and (5) 1-15 (8) and 37(a)(2)(A), counsel shall confer in good faith prior to the filing of motions, taking of depositions, making requests for admissions, or any other matter where conferring with other counsel may lead to simplification or limitation of issues. If there is a stipulated motion or need for an expedited ruling, this should be noted in the heading and the appropriate word, "stipulated", "unopposed", or "expedited" should be in bold.

5. Trial Protocol

A. *Jury Instructions.* File in compliance with C.R.C.P. 16(d). (*See: Order for Preparation for Jury Trial which will be issued at or about the time of trial call).* Computer disks ("Word" format on 3 ½" disks) shall be brought to court.

B. *Witnesses.* Each party shall subpoena all "will call" witnesses as identified in the Trial Management Order and shall not release "will call" witnesses from that subpoena without approval of the Court. By Thursday of the week prior to trial, two copies of a

typewritten, alphabetized list of the correctly spelled names of all witnesses and any unusual or technical words they will be using during their testimony shall be provided to the Court. Each party shall also provide a written schedule of when each witness is expected to be called during the trial.

C. *Exhibit Lists.* By Thursday prior to trial, you must file an index of all exhibits you expect to offer at trial.

D. *Exhibits.* Exhibits should be labeled prior to trial, Plaintiff(s) using numbers and Defendant(s) using letters. Multiple parties should pre-allocate designations among themselves to avoid duplication. The original trial exhibits by each party shall be used by the witnesses and a copy of each party's shall be provided to the Court at the beginning of trial.

E. *Exhibit Notebooks.* Trial exhibits from each party shall be placed into notebooks, one notebook for the witnesses and one for the Court, unless the exhibit is incapable of being placed into a notebook. All exhibits shall be tabbed with appropriate numbers or letters. Any exhibit which consists of multiple pages shall have each page numbered.

F. *Objections* to exhibits, expert witnesses and designated testimony shall be provided pursuant to the Trial Management Order. Unless admissibility of exhibits is stipulated by the parties, the Rules of Evidence shall control such admissibility.

G. *Expert Witnesses.* In trials to the Court, a written *curriculum vitae* (marked as an exhibit) will usually be sufficient foundation for qualification as an expert.

H. *Deposition Testimony.* Any party who wishes to present deposition testimony at trial shall follow the Tiral Management Order and C.R.C.P. 32, and submit the required material by the Thursday prior to trial. Disputes as to the admissibility of portions of depositions or deposition video tapes shall be submitted to the court 10 days before the first day of trial.

I. *Judicial Notice.* Each party shall provide a typewritten list of any facts of which a party is requesting that the Court take judicial notice.

J. At trail, all parties, prospective jurors and witnesses shall be addressed as "Mr.", "Mrs.", "Ms.", "Dr.", etc., unless permission of the Court is granted for more informal references.

K. *Large Exhibits.* Exhibits larger than 10" by 14" will not be retained by the Court after trial is completed. Copies or photographs of such exhibits are to be prepared prior to trial to be substituted for such exhibits at the end of the trial.

L. *Bills of Costs.* Bills of costs shall be filed pursuant to C.R.C.P. 121 1-15 and 1-22. A form of order shall be submitted as with other motions.

6. Sanctions. Failure to comply with any rule of civil procedure, including C.R.C.P. 16 and 26, or any provision of this Order, may result in loss of trial date, striking of witnesses or exhibits or other appropriate sanctions.

BY THE COURT:

/Signature/

JUDGE

1-5-2000

DATE

COLORADO COURT OF APPEALS

Court of Appeals No. 00CA0642

Arapahoe County District Court No. 99CV0391

Honorable Timothy L. Fasing, Judge

Dan Barnett,

Plaintiff-Appellant and Cross-Appellee,

v.

Denver Publishing Company, Inc., d/b/a Denver Rocky Mountain News,

Defendant-Appellee and Cross-Appellant.

JUDGMENT AFFIRMED, ORDER REVERSED, AND CAUSE REMANDED WITH DIRECTIONS

Division V

Opinion by JUDGE TAUBMAN

Rothenberg and Roy, JJ., concur

April 26, 2001

Dan Barnett, Pro Se

Baker & Hostetler LLP, Marc D. Flink, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

Plaintiff, Dan Barnett, appeals the dismissal of his defamation complaint against defendant, Denver Publishing Company, Inc., d/b/a Denver Rocky Mountain News (Rocky Mountain News). The Rocky Mountain news cross-appeals the trial court's denial of attorney fees. We affirm the judgment of dismissal, reverse the order rejecting the Rocky Mountain News' request for attorney fees, and remand for an award of those fees.

In 1998, Barnett ran for the Republican Party nomination for state representative in District 37. On May 2, 1998, the Republican Party in Arapahoe County held its county assembly to nominate candidates for various offices. The next day, the Rocky mountain News published an article about the assembly, which stated in pertinent part: "The District 37 race is to replace Rep. Martha Kreutz, who is seeking the GOP nomination in the 6th Congressional District .... Five candidates initially sought the District 37 nomination. But Dan Barnett, convicted in a stalking incident involving one of Kreutz's daughters, failed to show up."

In 1995, Barnett had pled guilty to harassment, a class three misdemeanor, under Colo. Sess. Laws1994, ch. 324, 18-9-111 at 2018.

The plea resulted from an incident in which one of Kreutz's daughters was the victim, and the plea court had described the case as "almost stalking."

Based upon this article, Barnett filed a defamation complaint against the Rocky Mountain News on January 29, 1999. Two weeks later, the Rocky mountain News filed a C.R.C.P. 12(b)(5) motion to dismiss for failure to statea claim upon which relief can be granted. Barnett filed a motion for summary judgment on February 16, 1999.

The trial court granted the Rocky Mountain news' motion to dismiss, but denied its request for attorney fees. The court also denied Barnett's motion for summary judgment.

I. Motion to Dismiss

Barnett contends that the trial court erred in granting the Rocky Mountain News' motion to dismiss. Specifically, he contends that the article was defamatory because it used the work "stalking," which in his view implies that he was convicted of felony stalking, rather than misdemeanor harassment, the charge of which he was convicted. We disagree.

Motions to dismiss for failure to state a claim are viewed with disfavor and should be granted only if it clearly appears that the plaintiff would not be entitled to any relief under the facts pled in the complaint. Hill v. Behrmann, 911 P.2d 679 (Colo. App. 1995), aff'd sub nom. Leeft Hand Ditch Co. v. Hill, 933 P.2d 1 (Colo. 1997).

A motion to dismiss for failure to state a claim must be decided solely on the basis of the allegations pled in the complaint, and the court must consider all allegations in the complaint in the light most favorable to the plaintiff. National Camera, Inc. v. Sanchez, 832 P.2d 960 (Colo. App. 1991). Appellate review of a motion to dismiss is de novo, and the court must accept all facts pled in the complaint as true. Fluid Technology, Inc. v. CVJ Axles, Inc., 964 P.2d 614 (Colo. Ap. 1998).

Because the threat of protracted litigation could have a chilling effect upon constitutionally protected rights of free speech, prompt resolution of defamation actions, by summary judgment or motion to dismiss, is appropriate. See Lockett v. Garrett, 1 P.3d 206 (Colo. App. 1999) (summary judgment).

The common law tort of defamation only requires a plaintiff to prove the defendant's publication of a defamatory statement by a preponderance of the evidence. The defendant then may prove substantial truth as an affirmative defense. However, if a public figure is involved, a heightened burden applies, and the plaintiff is required to prove the article's falsity by clear and convincing evidence. Smiley's Too, Inc. v. Denver Post Corp., 935 P.2d 39 (Colo. App. 1996).

This heightened burden requires a plaintiff to demonstrate that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it

was true or false. Lockett v. Garrett, supra. Actual malice can be shown if the author entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probably falsity. Lewis v. McGraw-Hill Broadcasting Co., 832 P. 2d 1118 (Colo. App. 1992).

Allegations of defamation of political candidates and public officials must be considered against the backdrop of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Lane v. Arkansas Valley Publishing Co., 675 P.2d 747, 750 (Colo. App. 1983) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 *1964)). Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. Lockett v. Garrett, supra.

Here, when the article was published, Barnett was a public figure because he was running for the Republican nomination for state representative. See Monitor Patriot Co. v. Roy., 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971) (candidate for elective public office is a public figure).

Contrary to the Rocky mountain News' contention, Barnett adequately alleged in his complaint that it acted with actual malice. However, even assuming that all of the facts pled are true, his claim must fail under the doctrine of substantial truth.

Truth is an absolute defense to a defamation claim brought against a public figure, and only false statements made with "actual malice" are subject to sanctions. People v. Ryan, 806 P.2d 935 (Colo. 1991). A party asserting truth as a defense in a defamation action is not required to justify every word of the alleged defamatory matter. It is sufficient if "the substance, the gist, the sting, of the matter is true." Gomba v. McLaughlin, 180 Colo. 232, 236, 504 P.2d 337, 339 (1972).

Here, the statement that Barnett had been "convicted in a stalking incident" was substantially true. Barnett alleged in his complaint that the "judge upon sentencing in 1995 in front of 3 attorneys and a court reporter [stated] that he had never seen love like this before and that it was Almost Stalking."

Barnett asserts that the Rocky Mountain News' article was defamatory because stalking is only punishable as a felony. He is mistaken. In 1995, when he pled guilty to misdemeanor harassment, stalking was a class 1 misdemeanor. See Colo. Sess. Laws 1995, ch. 240, 18-9-111 at 1258. Although there is a distinction between harassment, which is a misdemeanor, and stalking, which is now a felony, both terms describe similar repeated, unsolicited behavior.

Barnett also contends that the article mistakenly suggested he was convicted of felony stalking. We disagree, and note that the article never used the word "felony" or asserted that his conviction was for a felony charge.

Courts in other jurisdictions have held that technical errors in legal terminology and reports involving violation of the law are of no legal consequence. See Simonson v. United Press International, Inc., 654 F.2d 478 (7th Cir. 1981) (article reporting person charged with rape, when actually charged with second degree sexual assault, not defamatory, because statement was not made false by substituting a word in common usage for an exact legalism); Read v. Phoenix Newspapers, Inc., 819 P.2d 939 (Ariz. 1991) (newspaper article describing a defendant's conviction for "firing a gun" when he was actually convicted of "exhibiting the gun," was not defamatory, because the inaccurate statement did not cause him any more damage than that which resulted from his actual conviction and sentence).

Accordingly, although Barnett was convicted of harassment, not stalking, we conclude that the Rocky Mountain News' use of the term "stalking" to describe his conviction was substantially true, and his defamation claim was properly dismissed.

Barnett further claims that because the article failed to state the date of his conviction, readers were led to believe that he was absent from the assembly because he was in jail. The article made no such claim. Rather, it indicated that Barnett could have attended, but he "failed to show up."

Because we conclude that the article was not defamatory, we also reject Barnett's request for an injunction ordering the Rocky Mountain News to remove the article from its internet archives.

II. Summary Judgment

We do not address Barnett's contention that the trial court erred in denying his motion for summary judgment, because a denial of summary judgment is not an appealable order. Feiger, Collision & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996).

III. Attorney Fees

On cross-appeal, the Rocky Mountain News contends that the trial court erred by rejecting its claim for attorney fees. We agree.

Section 13-17-201, C.R.S. 2000, provides: "In all actions brought as a result of ... an injury to person or property occasioned by the tort of another person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action." Under this section, an award of attorney fees is mandatory when a trial court dismisses an action under C.R.C.P. 12 (b). Houdek v. Mobil Oil Corp., 879 P.2d 417 (Colo. App. 1994).

Defamation is "an injury to person or property occasioned by the tort of any other person." See Brooks v. Jackson, 813 P.2d 847 (Colo. App. 1991).

The trial court rejected the Rocky Mountain News' request for attorney fees without explanation. However, because we have concluded that the trial court properly dismissed Barnett's claim under C.R.C.P. 12(b)(5), it was required to award attorney fees to the Rocky

Mountain News. Furthermore, the Rocky Mountain News is entitled to reasonable attorneys fees for defending this appeal. See Henderson v. Bear, 968 P.2d 144 (Colo. App. 1998).

The judgment dismissing Barnett's claim is affirmed, the order rejecting the Rocky mountain News' claim for reasonable attorney fees is reversed, and the cause is remanded for a determination of the amount of such fees.

JUDGE ROTHENBERG and JUDGE ROY concur.

COLORADO COURT OF APPEALS

No. 00CA642

August 16, 2001

ORDER DENYING PETITION FOR REHEARING

DAN BARNETT, CROSS-APPELLEE, PLAINTIFF-APPELLANT

v.

DENVER PUBLISHING COMPANY, INC., D/B/A DENVER ROCKY MTN NEWS, DEFENDANT-APPELLEE/CROSS-APPELLANT

Appeal from the ARAPAHOE COUNTY

Honorable TIMOTHY L FASING, Judge

No. 99CV391

The PETITION FOR REHEARING filed in this appeal by:

DAN BARNETT/PLAINTIFF-APPELLANT

Is DENIED.

Issuance of the Mandate is stayed until: September 17, 2001.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorad, then the stay shall remain in effect u ntil a disposition of the cause by that Court.

By the Court:

TAUBMAN, J.

ROTHERNBERG, J.

ROY, J.

C.R.S. Rule 44 Page 1571: In a review involving the Constitutionality of any Colorado statute in which neither the state, nor any state agency, nor any representative, the party raising such question does hereby give notice writing to the Supreme Court of the existence of the question. The clerk must therefore fulfill the duty and shall thereupon certify such fact to the attorney general, as the Court of Appeals is attempting to allow two separations + (a sentence enhancer) of crime as being qual as never before in the history of the United States of America has never legally been successfully applied by a libeler with existing laws of even one classification of crime difference for that matter. Attorney General Ken Salazar (303) 866-4500. Colorado State Capitol 200 East Colfax Denver, CO 80203-1784.

United Nations Universal Declaration of Human Rights, Article 2.

No one shall be held guilty of any penal offense which did not constitute a penal offense nor shall a heavier penalty be imposed offense than the one that was applicable at the time the penal offense was committed. **U.S. Constitution Amendment XIV (1868) Section 1.** No State shall make or enforce any law which shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection under the laws. A person cannot be convicted of a crime he was never charged with. **U.S. Constitution Amendment VI** (1791). In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue

Denver, CO 80203

On Certiorari to the Court of Appeals

Case of Appeals Case No. 00CA0642

DAN BARNETT,

Petitioner,

v.

Respondent,

DENVER PUBLISHING COMPANY d/b/a

ROCKY MOUNTAIN NEWS INC.

Case No. 01SC620

Dan Barnett

6565 South Syracuse Way, Suite 404

Englewood, CO 80111

303-796-9687

REPLY IN SUPPORT PETITION FOR WRIT OF CERTIORIARI

May it please the court. The Petitioner has again won the case on the merits. The response was replete with contradictions, false facts, statements purposefully out of context, and with many arguments that belong in the lower courts as previously debated. The Respondent entirely failed to prove why the Supreme Court should not take appropriate actions. The Respondent still has failed to prove opposite of what the Court of Appeals states was a matter of fact. The Respondent still ignores that it has already been established as a fact by the Court of Appeals (Opinion Page 6, Last Paragrph) and continues to try and spin the information to splatter the Petitioner as being such a bad person that right and wrong do not matter and close enough counts. All crimes of Colorado Criminal Code should be equal with the logic of the Respondent. The Respondent needs to be reminded that the Petitioner is not on trial here. That is reserved for Criminal cases. The Defendant is the "one out of the law" and on trial for their behavior, and that point will be proven in front of the jury. The Petitioner has never been charged with the crime the Court of Appeals declares as a matter of fact. If the Respondent has a problem with that then they should have filed a Cross-Petition for Certiorari debating this established fact. They are fighting the wrong entity. On (Page 7, Line 12 of the Opposition to Petition for Write of Certiorari), the Respondent agrees with the Statue on May 10, 1995. That confirms that the Defense has admitted the cognition of fact that the Statue is uncontested as the legislature wrote it. It was very clear.

The Petitioner has never been charged with the crime factually identified in the article. There is no ***First Amendment*** relevant issue for the Respondent, but only for the Petitioner. Here as the press was allowed to write any way they see fit as long as they do not make it a worse crime by fact. As far as the hearsay, the Defense should have known how horrible rumors can be by other voting political persons. With transitive reasoning, the Petitioner remembers one Colorado candidate in 1998 being called a Murderer for voting his conscience on the right to abort a pregnancy. Common sense would call for the reporter to look for a Murder conviction before writing it as a matter of fact. This analogy is no different from this case being plead today. The Defendant either knew the information was probably not true and wrote it with personal political motives or never bothered to check anywhere. ***Anywhere*** the Defendant checked would have shown properly filed convictions, and not the worse one concocted by the Respondent.

There never has been an issue of "privilege" as the Defense's exhibit was never looked at prior to writing the article, or in the alternative, was properly labeled so that even a child could not think that it was anything but exactly what the law is by Colorado State Statute, a third degree misdemeanor. The Defendant's accusation has been proven and established by the Court of Appeals to be factually false. What the Respondent actually shows with purported evidence was the lowest form of misdemeanor conviction in the State of

Colorado. It was unfortunate the defendant violated probation in that case and was late for his first probation meeting. The law is something not to be messed with. But, it never even closely matches what the Respondent says it is by the Statute. There is a huge difference. The Petitioner is just asking for what is legal and fair. If the Supreme Court agrees with the Respondent, then all of the Colorado Criminal Code must be rewritten so that all crimes are equal regardless of level, skipping right over one and two levels of difference and starting at two levels of difference plus a sentence enhancer.

In regards to the **Questions Presented For Review by the Petitioner (A through F),** the Respondent did not respond correctly to questions presented for review and went out on a tangent into previously irrelevant arguments to try and build up a purely emotionally based strategy. From the questions presented for review, and after reviewing the Respondent's assertions, the following should now be considered fact.

A. A jury trial is a Constitutional right. ***Article 2, Section 10*** for Libel defamation. The reason this clause was created by its framers was to create a safety net precisely for cases like this. The only discussion ever in regards to this by the Defendant is regarding pre-trial witnesses testimony where the Defendant requested to Depose the witnesses but this was not granted by the District Court, as not required at that early of a time by Case Management rules and by this action was in a sense requesting the right to a jury trial to fend off the

Motion for Summary Judgment of the Plaintiff. A jury trial is not for the Defense only. That would not be fair if it were a law, but is not for good reason. Case Management rules are for both sides.

B. The crime the Defense would like to show to help defend their position is much less than the accusation in accordance to Colorado Criminal Code. Injunction relief was mandatory. To not issue an Injunction would let stand a *sui generis* ruling and the Supreme Court has duty, possessing neither the sword nor the purse to sustain public confidence in moral sanctions. ***Eighth Amendment.*** Not allowing for an Injunction would be cruel and unusual as shown to be legally false. It would shock the conscience of the voting citizens if our land's Constitution was not followed and if our society began to regress towards totalitarianism, and away from our fabric of Democracy with our basic charter of liberties in the ***Bill of Rights*** and its penumbras. The statement in question on the Internet enjoined with the scrutiny of being a public official as the Petitioner is today, would allow this legally unequal accusation that now is a trickling stream to become a raging torrent with the advancement of technology. The Petitioner faces a clear and present danger as a matter of fact and will be unfairly stigmatized with lasting significance. The Respondent has jeopardized the reputation of the Petitioner by refusing to change the legally false fact, and has diluted the truth. A wrong can still be righted by the giant newspaper.

C. The laws from the two other states were misapplied by both the Court of Appeals and the Respondent as equal levels as is different here as classified as a minimum two levels of difference + (a sentence enhancer for being an extraordinary risk of violent harm to society).

D. The Respondent did not object in any way to a change of venue.

E. The Respondent did not refute that the Constitution in regards to due process was violated and apparently, also the Respondent does not know why the Court of Appeals did not address this issue. As the briefs in the trial court were written with the knowledge of who was the judge and then switched without knowledge or consent of the Plaintiff, created an unsolveable riddle of the ***Due Process Clause*** of the ***Fourteenth Amendment of the United States.***

F. The Respondent still fails to see that there is no "privilege" when it comes to Per Se convictions as recklessness was already established according to the Court of Appeals. Statements that are not accurate or fair are not "privileged." The substantial truth doctrine shows that these arguments are substantially false. It was not a legally accurate summary. It is legally incongruent. There is a substantial difference that produced substantially greater "sting". The Plaintiff has not made any flaws large enough in the Complaint or in the briefs in the trial court not to win the entire case. In regards to the Respondents last sentence of their brief, "issues not raised in trial court will not be considered upon appeal." That's great because the Plaintiff has already won prima facie before we get to trial on that set of

encapsulated briefs alone. The Defense knows if this goes to trial they have absolutely zero chance to prevail and for that reason has fought so vigorously on court procedures and have tried every way possible to get this case thrown out on anything besides the facts of law.

1. Most of the arguments presented by the Respondent were previously presented in lower courts but have nothing to do with the direct relation to the issues presented for review. The Respondent does not request the Supreme Court to review the Statute as to its legality. It was very clear. All the Petitioner is requesting is for the Supreme Court to apply existing law.

2. As far as mental health of the Petitioner since the Respondent brings it up, is how it has always been. Perfect. Mentally fit for any endeavor.

3. Respondent believes that the Petitioner is upset about law application in 1995. The Respondent writes in the footnote on the bottom of (page 5), "Mr. Barnett remains in denial of the seriousness of his conduct." "Mr. Barnett attributes his conviction to the District Court Judge's failure to apply the law." These statements by the Respondent make no sense whatsoever. This is not a criminal case but a civil case as these two statements have absolutely nothing to do with the degree of guilt of the Denver Publishing Company d/b/a Denver Rocky Mountain News. The Respondent is trying to blend in emotional and irrelevant information into this case for sympathetic acceptance by the Supreme Court. The Supreme Court is not to be

swayed by emotion, but by fact and law. There is no animosity towards those persons mentioned, by the Petitioner. That is totally unrelated and bizarre as an argument. If that was the case the Petitioner would have started proceedings in that direction and the Respondent would have never been served. What is upsetting to the Petitioner though, is being convicted in the media by a lynchmob of reporters, editors, and defense attorneys for the newspaper, bypassing criminal court procedures. This is the United States of America and we have a civil ***Bill of Rights*** **(1 Will. And M. (1689), the** ***United Nations Universal Declaration of Human Rights*****, Article 2, the** ***U.S. Constitution Amendment I*****, the** ***U.S. Constitution Amendment VIII*****, and common laws** of the ***Magna Carta*** **and the** ***Petition of Right*** **(3) Car. (1628).** This civil case also serves as a brethren mirror for ***Habeas Corpus*** **(31 Car. 2 (1679), and Miranda.** All of these sources back up the Petitioner alone. There is no [illegible]ding the filthy hands of the Defendant. Very simply, the Defendant is guilty of Civil Libel. There are no other Defendants, nor should there be.

4. As far as the Respondent's repetitive dragging all kinds of mud from a properly labeled and dated third degree misdemeanor file, it is different from what the Respondent would like it to be, a first degree plus a sentence enhancer for being an extraordinary harm to society with repeated violent threats. It should be noted that almost half of the physical paper of the Opposition to the Petition for Writ of Certiorari is formed by nothing more than invidious footnotes that are

irrelevant to this civil case, and irrelevant to the Respondent's guilt. The Petitioner extends to the Supreme Court the opportunity to strike any comments that do not advance the facts from any and all briefs. The Petitioner is above the pettiness and does not want to get into name calling where such squabbles have no place in the seriousness of the Colorado Supreme Court, where Constitutional issues are the agenda. The Plaintiff's juvenile passion there burned out years and years ago. The Petitioner would like it noted the Respondent has entered enough information to have drawn a perfectly legal description without trampling on the Constitutional rights of the Petitioner. The Petitioner is not treading on the *First Amendment* rights of the Respondent as they can rewrite fairly and legally. It can be full and robust for wide open debate as long as it is factually and legally true. The Respondent could use their own briefs to rewrite the Internet statement in a legal way, or in other words, what should have happened the day the statement was written in 1998. The Respondent is illogical and incorrect. At (Roman numeral IV, first sentence) of the Respondent's brief, "Mr. Barnett's Notice of Appeal requested that the Court of Appeals expedite the appeal and enjoin the News from maintaining the article on the Internet." The Petitioner has never "asked" for the Court of Appeals to "enjoin" the News as a Defendant. The Petitioner has not enjoined the State of Colorado for failing to issue an Injunction yet because it is the belief that the Supreme Court will do the right thing and follow the Constitution and remove the

conviction from the Internet because it has been shown to be factually false and with the hope that the Supreme Court is egalitarian. The Petitioner has no plans to sue anyone else besides the Defendant as they are solely responsible for the damages. It should be clear, the only current problem of the Petitioner is the current Respondent. The Petitioner has never sued anyone else in regards to the recklessness of the Respondent. If the Respondent feels they have been wronged by Colorado State Statue, or perhaps the Court of Appeals itself for declaring facts and recklessness establishments, or has been led astray by voting political gossips, they have the right to try and make those entities change their behavior. They have not done so. It is quite obvious though the human error was alone on the part of the large newspaper, the "Denver Publishing Company", as they acted recklessly.

5. Per Se criminal convictions are actionable and "privilege" does not triumph over recklessness. A "privileged" defense would perhaps work with a falsely labeled file or an incorrect computer system error with the Colorado Bureau of Investigations, or perhaps even an equal crime file, but not in this case. From the Defendant's non-factual "so-called" evidence the date was shown (8) times, the Statute (3) times, and the level of crime more than (6) times. The Petitioner poses the question of why was this date, and this crime not used in the article if that is the Defense's strategy? The Statute is clear to the Respondent (Page 7, Line 12 of the Opposition to the

Write of Certiorari.) The line on tarnished evidence, dug up by the Respondent's attorneys *ex post facto* has been burned with a laser beam on this different classification of file. Common sense would say "no" to the Defendant. The logic of the Respondent is tainted. On (Page 10, fourth line from the bottom) the Respondent states "So long as they convey the substance of the allegations made in court, it does not matter that the statements concerning Mr. Barnett were made by a personal and political enemy." It would not be O.K. to shout the statement from the article at a political gathering as it would not be true. The newspaper statement was not fair nor accurate by law. The fair report privilege does not apply to statements made by a third party if they are legally false. Recklessness was successfully established and is a question for the jury. "Privilege" only is for correctly interchangeable working as is legally impossible here today, or perhaps just plain error of other Government entities never before argued by the Defense. The Defense has never shown a legal source of the crime as they wrote it, because there isn't one. There was no computer glitch. The Respondent still has not sued any agency to change file labels or computer systems because the papers the Respondent refers to are not evidence of the accused crime. It is legally and factually different and they would not have the right to sue to make such a change to what the Respondent would like to see as a fact. This means that when the Injunction is granted it will have lasting significance. For the Defense to have what they want there

would have been criminal proceedings on the least a first degree crime charge with such a defendant having the such proper rights to contest such accusations. **The Respondent has never shown such proceedings because there never has been any.** Apparently some attorneys get paid to argue the color white is really black and day is actually night. The false statement was very hurtful and caused the Petitioner to be shunned. The Petitioner is in present and immediate need of relief as a public figure and also just as an ordinary citizen from the defamatory statement. Until the In junction is issued to comply with the laws of Colorado, the Petitioner has no legal financial liability. It is legally not correct. As it presently stands this ruling leaves the Constitution in shambles. The Respondent, in the footnote (Page 2, of the Opposition to Petition for Writ of Certiorari) stated with case law that "as a matter of Constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant." This statement shows that since the Constitution of Colorado has been violated the Supreme Court has no choice that to take action and issue the Injunction. The community has a right to know the legal, and factual truth. ***1st Amendment of the U.S. Constitution.***

6. The Petitioner has won the right to an Injunction and if the Defense loses with a jury in this Libel case after the Injunction is issued, as it presently stands in the trial court, (or as reordered to argue altogether because due process was annulled unconstitutionally),

in regards to recklessness, they must pay fair and square as would the Plaintiff if he lost at trial. Mr. Barnett can and will hold the Respondent accountable for their behavior and will easily prevail on the merits of the claim. By law they are liable. Law and logic prevail over spin doctoring and electioneering, and any jury member would easily agree with the facts of the Constitution. It would be hard to find reason for any jury member not to qualify as all we are dealing with are established facts and the laws of Colorado.

7. **The Court of Appeals correctly established the facts (Opinion Page 6, last paragraph) which entirely nullified the entire labeled argument (Starting Page 6: I, III, IV, and V) of the Respondent**. The Respondent is still in unshakable denial of this fact. They are also denying that reckless behavior has been acknowledge by the Court of Appeals as evident for trial. Contrary to the Respondent's beliefs, it was not accurate as shown in pleadings here, and as witnesses will testify to being much worse by fact and defamatory. This relegates the Respondent with no argument at all, and no logic, and only, leaves (IV) of the Respondent's Opposition to Petition for Writ of Certiorari, with regards to early disposition of defamation claims which the Petitioner agrees with. That is the law. But those laws are a two way street. The Petitioner though has waited three and one half years for justice, but can wait as long as it takes for justice to be served and the docket to clear, as appropriate, of other more

immediate issues of public importance by severity of Constitutional crisis such as Congressional redistricting.

8. The Supreme Court should take all necessary steps to correct this unfinished and very large quagmire. As this case was previously set by telephone for trial it should be noted the Respondent was the one to choose the last possible trial date and the Petitioner requests the Supreme Court to assign, or order the first trial date available as expeditiously as possible so that the Petitioner can again run for office or public leadership positions in his community immediately without being incorrectly labeled of a crime conviction never charged with nor committed, and also just because it is the right thing to do. The Petitioner is a person with feelings just like everyone else. Furthermore, as aggravating proof, it is not legally possible for *anyone*, (apart from intuition by osmosis as the Respondent would like the Supreme Court to believe in), to factually know what the article refers to and therefore, *no person* can **not** be sure that it was **not** a felony conviction because there is no element of date in the article with witnesses to testify. Evidence to date has shown no evidence to refute this. The Defendant should have been careful, and not reckless.

9. A citizen cannot be convicted of a crime he has never been charged with nor convicted ***U.S. Constitution Amendment VI*** and is by law actionable per se. The Respondent has no factual basis and apparently wants the Petitioner to endure additional punishment by not offering to remove what was shown to be legally false and has

decided to also take up the job of a renegade, vigilante prosecutor outside of Criminal court and the laws of Colorado. The Respondent is trying to confuse the courts to go above the law and beyond what the Colorado Constitution allows, for additional public punishment by leaving the statement on the Internet, with any means possible legal or otherwise until the Petitioner forces their behavior to change. This Defense attorney attitude of "Win at all cost, we don't care if it is wrong and hurts the reputation of the Petitioner" makes no sense at all and is most likely the same of the Editors and the Reporter. Just because the Respondent is also a legal giant does not give them the right to spin the law. If the Respondent requests the laws to change for Libel and Criminal Code, than they should petition the legislature to create such new "special" laws for them. Not one Defense case cited can withstand the burden placed upon the Respondent. If the Supreme Court does choose Declaratory relief for the Petitioner under the current set of facts, please also consider that the Defense at one point argued in the trial court briefs that the newspaper was a medium size paper by circulation. With the failure to remove the statement the Defendant has exacerbated the problem by more than doubling the circulation with the Sunday edition, so that statement of medium size should now be expunged as a mitigating factor consideration. The Injunction is mandatory. I don't know one person who would want an untrue, disgusting, and legally false statement about them to remain on the Internet. The time has come for the Respondent to accept

responsibility for their reckless behavior, and remove the statement. The Petitioner has been ***guaranteed*** this Injunction by the ***extraordinary*** Bill of Rights.

GUARANTEED.

The Injunction fits neatly into the conventional mosaic of constitutional guarantees superseding all others for the right to liberty and equal protection as no public servant shall have the right to morally sway from our Federal Constitution. The Court of Appeals left this case profoundly unsettled as this case will stand for liberty and justice and as a symbolic landmark for others wrongly accused in the future, and to help defend freed from tyranny and oppression. There is no greater summons of the government than the Constitutional commandment to protect against the power to take away a person's liberty.

Otherwise, the Petitioner would have no way to refute something legally incorrect. Let the Supreme Court be the arbiter.

Respectfully submitted,

Dan Barnett

/Signature/

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Honorable Marcia S. Krieger

Civil Action NO. 01-MK-2533(CBS)

DANIEL JAMES BARNETT,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

ORDER OVERRULLING OBJECTIONS AND ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDTATION

THIS MATTER comes before the Court pursuant to the Plaintiff *pro se*'s Objections (#23) to the Recommendation (#21) and Supplemental Recommendation (#22) of the United States Magistrate Judge Craig B. Shaffer.

On June 27, 2002, Magistrate Judge Shaffer issued a Report and Recommendation that the Defendants' Motion to Dismiss (#8) be granted, on the grounds that the Plaintiff's claim was barred by the *Rooker-Feldman* doctrine, that the Plaintiff's Complaint violated Fed.

R. Civ. P. 8(a) and 12(b)(6), and that the Defendant was entitled to 11th Amendment immunity. On July 1, 2002, Magistrate Judge Shaffer issued a Supplemental Recommendation that the Plaintiff's Motion for Summary Judgment (#9) be denied in light of the July 27, 2002 Recommendation.

The Plaintiff filed a timely objection to both recommendations. The Plaintiff's objection suffers from the same prolixity and incoherency cited by Magistrate Judge Shaffer. The vast bulk of the Plaintiff's objections appears to be his rehashing of his position with regard to the circumstances underlying a defamation claim he filed against the *Rocky mountain News* in 1999[1]. The only portion of the objections that specifically addresses Magistrate Judge Shaffer's findings is the Plaintiff's contention that "the United States Supreme Court has ruled that citizens can now sue the state and win, rolling back the Rocker-Feldman (sic) Doctrine and the Eleventh Amendment immunity." *Citing Lapides v. Board of Regents*, 535 U.S. 613, 122 S. Ct. 1640 (2002).

The Court has reviewed *Lapides* and finds that it provides no support for the Plaintiff's position. In *Lapides*, the Court merely found that, by removing a state-court case against it to federal court, a state would be deemed to have waived its Eleventh Amendment immunity. 122 S.Ct 1646. Obviously, *Lapides* has no bearing on this case, which the Plaintiff commenced in federal court. Moreover, *Lapides* does not mention the *Rooker-Feldman* doctrine, much less

vitiate its clear application to this case, which, at bottom, essentially seeks to challenge the validity of the state court decisions dismissing the Plaintiff's defamation case. Indeed, the 10th Circuit recognized the continuing vitality of the *Rooker-Feldman* doctrine as recently as December 17, 2002 in *Kenmen Engineering v. City of Union*, 314 F.3d 468 (10th Cir. 2002) ("In other words, *Rooker-Feldman* precludes a party losing in state court from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights") (internal quotes omitted).

In addition, to the extent that the Court has been able to determine the arguments raised in the Plaintiff's objections, it has considered them with the deference accorded *pro se* litigants and finds them to be without merit. Accordingly, the Plaintiff's Objections (#23) are **OVERRULLED** and the Recommendations (#21, 22) of Magistrate Judge Shaffer are adopted in their entirety as if set forth herein. The Defendant's Motion to Dismiss (#8) is **GRANTED**, and the Plaintiff's Motion for Summary Judgment (#9) is **DENIED**. The Complaint is dismissed with prejudice and the Clerk of the Court is directed to close this case.

Dated this 12th day of February , 2003.

BY THE COURT:

/Signature/

Marcia S. Krieger,

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 01-MK-2533 (CBS)

DANIEL JAMES BARNETT,

Plaintiff,

v.

STATE OF COLROADO,

Defendant.

SUPPLEMENTAL RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Craig B. Shaffer

THIS MATTER comes before the court on Plaintiff's Motion for Partial Summary Judgment (filed March 25, 2002). Pursuant to the January 15, 2002 Order of Reference, this case was referred to the Magistrate Judge to, *inter alia*, "submit proposed findings of fact and recommendations for rulings on dispositive motions." At a status conference held on May 13, 2002, the magistrate Judge granted Defendant's Motion to Stay Discovery and Vacate Scheduling Conference (filed March 25, 2002) and the case was stayed pending resolution of the Motion to Dismiss. On June 27, 2002, the

Magistrate judge issued his Recommendation that the Motion to Dismiss be granted and this civil action be dismissed. In light of the June 27, 2002 Recommendation, the court hereby further

RECOMMENDS that Plaintiff's Motion for Partial Summary Judgment (filed March 25, 2002) be DENIED.

Advisement to the Parties

Within 10 days after service of a copy of the Recommendation, any party may serve and file written objections to the magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. 636(b)(1). Objections to a magistrate judge's recommendation must be made within 10 days of service of the Recommendation. 28 U.S.C.-636(b)(1); Fed. R. Civ.P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995).

The district judge shall make a *de novo* determination of those specific portions of the proposed findings or recommendations to which specific objection is made. 28 U.S.C. 636(b)(1). A general objection that odes not put the district cour ton notice of the basis for the objections will not preserve the objection for *de novo* review by the district court. *See In re Griego*, 64. F.3d at 583; *United States v. One Parcel of Real Property Known as 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir.), *cert denied*, 519 U.S. 909 (1996). The district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate

judge. 28 U.S.C. 636(b)(1). The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. 28 U.S.C. 636(b)(1).

"[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court of for appellate review." *One Parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d at 1060. Failure to make timely objections to the magistrate judge's proposed findings and recommendations will bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *In re Key Energy Resources, Inc.*, 230 F.3d 1197, 1199-1201 (10th Cir. 2000); *Theede v. United States Department of Labor*, 172 F.3d 1262, 1267-68 (10th Circ. 1999); *One Parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d at 1059-60.

DATED at Denver, Colorado this 25th day of June, 2002.

BY THE COURT:

/Signature/

Craig B. Shaffer

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 01-MK-2533 (CBS)

DANIEL JAMES BARNETT,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

RECOMMENDTATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Craig B. Shaffer

THIS MATTER comes before the court on Defendant's ("the State's) Motion to Dismiss (filed March 1, 2002). On January 15, 2002, Judge Wiley Y. Daniel referred this case to the Magistrate judge to, *inter alia*, "[h]ear and determine pretrial matters including discovery and other non-dispositive motions ..." and "[to] submit proposed findings of fact and recommendations for rulings on dispositive motions." On February 12, 2002 Judge Daniel transferred the case to Judge Marcia S. Krieger, who in an order filed March 27, 2002 set March 18, 2002 as the deadline for submitting "any response

or objection to the Motion [to Dismiss]" and April 2, 2002 as the deadline for any reply to the response or objection. On April 2, 2002, Barnett filed an objection and request for hearing. The State filed no subsequent reply. At a status conference conducted by the Magistrate Judge on May 13, 2002, the Stat's Motion to Stay Discovery and Vacate Scheduling Conference (filed March 25, 2002) was granted and the case stayed pending resolution of the State's Motion to Dismiss.

1. Background

In 1998, Barnett was a candidate for the Republican nomination for state representative in District 37. On May 2, 1998 the Arapahoe County Republican Party conducted a county assembly to nominate candidates for office up for election. A reporter from the Rocky Mountain news covered the proceedings and wrote an article published the next day that said in part: "The District 37 race is to replace Rep. Martha Kreutz, who is seeking the GOP nomination in the 6th Congressional District ... Five candidates initially sought the District 37 nomination. But Dan Barnett, convicted in a stalking incident involving one of Kreutz's daughters, failed to show up." (*Barnett v. Denver Publishing Co., inc., d/b/a Denver Rocky Mountain News*, Case No. 00CA0642 (Colo. App. April 26, 2001) at p.1).

In 1995, Barnett had pleaded guilty to harassment, a Class 3 misdemeanor under Colo. Sess. Laws 1994, ch 324, 18-9-111 at 2018.

The plea resulted from an incident in which one of Kreutz's daughters was the victim, and the plea court had described the case as "almost stalking." *(Barnett v. Denver Publishing Co.* at p. 1).

Based upon the article, Barnett filed a defamation complaint on January 29, 1999 against the Rocky Mountain News ("the News"). The News filed a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to C.R.C.P. 12(b)(5), and Barnett filed a Motion for Summary Judgment. The Arapahoe County District Court granted the News' Motion to Dismiss and denied Barnett's Motion for Summary Judgment (Case No. 99CV391).

On April 26, 2001 the Colorado Court of Appeals affirmed the dismissal of Barnett's claim and remanded the case to the trial court for award to the newspaper of reasonable attorney fees. (*Barnett v. Denver publishing Co.* p. 8). On Aug 16, 2001, the Colorado Court of Appeals denied Barnett's Petition for Rehearing. Barnett filed a Petition for Write of Certiorari to the Colorado Supreme Court (Case No. 01SC620), which on December 17, 2001 was denied.

On December 31, 2001 Barnett filed this *pro se* Complaint against the State of Colorado in U.S. District Court, alleging "collusion with the media" (*Barnett v. Denver Publishing Co.* p. 2) to publicly punish Barnett (*Id.* At 5) and false imprisonment (*Id.* At 5). Among other discontents, Barnett objects to the Colorado Supreme Court's refusal to issue an injunction on his behalf, his having to pay court costs, and his having been "tricked by the judge." *(Id.* At 4).

The rambling Complaint seeks removal of an unidentified county court judge, deletion of the Court of Appeals opinion from the Internet for "seven errors of law", and award of $7 million "equitable compensation." *(Id.* At 5).

The State seeks dismissal for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12 (b)(6). The State asserts that the U.S. Supreme Court is the proper forum for Barnett's grievance and notes that Barnett has indicated intent to file such an appeal, which Barnett did on March 14, 2002 in a Petition for Extraordinary Writ of Certiorari. The U.S. Supreme Court denied the petition (Case No. 01-1367) on May 13, 2002. Barnett submitted a Petition for Rehearing on June 5, 2002.

2. Analysis

a. Rule 12(b)(1) and the *Rooker-Feldman* Doctrine

The State argues that the federal district court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-16 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). Under *Rooker-Feldman*, a federal district court cannot review matters decided by a state court nor issue "declaratory relief that is 'inextricably intertwined' with the state court judgment." *Facio v. Jones*, 929 F.2d 541, 543 (10th Cir. 1991).

The relief sought is "inextricably intertwined" if the action "would effectively reverse the state court decision or void its ruling." *See Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995). However, the relief is not "inextricably intertwined" if the purpose of the federal action is "separable from and collateral to" a state court judgment even if the action necessitates some consideration of the merits of the state court judgment. *See Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2nd Cir. 1986), *rev'd*, 481 U.S. 1 (1987).

Cases may be reasonable dismissed for lack of jurisdiction if they are "expressly framed as an appeal from a state court to a lower federal court." They also may be dismissed if they "involve simple redundant litigation." *See* Wright & Miller, *Federal Practice and Procedure; Jurisdiction* 4469 at 664. The Tenth Circuit Court of Appeals has made it clear that a federal court "is not an appellate court to determine whether the ruling of the state trial court was correct, nor whether there were errors in its findings and conclusions." *Neagle v. Brooks*, 373 F.2d 40, 44 (1967).

The court has construed the Complaint liberally because Barnett is represnting himself. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the court may not be the *pro se* party's advocate. *See Hall*, 935 F.2d at 1110. A court may not assume that a plaintiff can prove facts that have not been alleged, nor that a defendant has violated laws in ways a plaintiff has not alleged. *Associated General Contractors of*

California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983).

Close consideration reveals that Barnett's impetus for entering federal court is dissatisfaction with the outcome he achieved in the Colorado court system and not violation of federal rights separable from or collateral to the underlying arguments asserted in his state claims. Since the true purpose of Barnett's federal action is to seek appellate review of the state judgment based on the losing party's claim that the state judgment violates the loser's federal rights, the *Rooker-Feldman* doctrine is applicable and prohibits this court's further consideration of the Complaint. *See Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994).

b. The Complaint, even if not barred from federal district court by the *Rooker-Feldman* doctrine, fails for additional reasons.

i. Pleadings Requirements

Dismissal of a complaint for "failure to state a claim upon which relief can be granted" under Federal Rule of Civil Procedure Rule 12(b)(6) is founded on well-established principles. First, the court must accept as true the plaintiff's well-pleaded factual allegations and construe them in a light most favorable to plaintiff. *See Maez v. Mountain States Tel. And Tel. Inc.*, 54 F.3d 1488, 1496 (10th Cir. 1995). The court's function is not to weigh evidence the parties may present at trial, "but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief

may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). "[C]onclusory allegation s without supporting factual averments are insufficient to state a claim on which relief can be based." *Riddle v. Mondragon*, 83 F.3d 1197, 1201 (10th Cir. 1996). An examination of the Complaint fails to reveal either claims for which relief can be granted or well-pleaded facts to support legal sufficiency. Even allowing for a liberal interpretation, it is evident that the assertions in the Complaint are disjointed and conclusory. They are far from well-pleaded factual allegations the court can construe in a light most favorable to Barnett. *See Maez*, 54 F.3d at 1496.

Rule 12(b)(6) msut be read in conjunction with Fed. R. Civ. P. 8(a). *American Fair Credit Ass'n v. United Credit Nat. Bank* 132 F.Supp.2d 1304 (D.Colo. 2001). Rules 8(a) and 8(e)(1) require a plaintiff to submit a pleading that is simple, brief, and clear. It need not contain legal theory, *see Siegelman v. Cunard White Str Ltd.*, 221 F.2d 189, 196 (2nd Cir. 1955), nor slavishly adhere to technical rules, *see Travelers Indem. Co. v. U.S. for Use of Constr. Specialties Co.*, 383 F.2d 103, 106 (10h Cir. 1967). Generality is permitted, especially for *pro se* plaintiffs, whose complaints must be construed more liberally than those represented by counsel. *See Elliott v. Bronson*, 872 F.2d 20, 21 (2nd Cir. 1989). But the pleading's statement still must be sufficient to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v.*

Gibson, 355 U.S. 41, 48 (1957); *Riblet Tramway Co. v. Monte Verde Corp.* 453 F.2d 313, 318-19 (10th Cir. 1972). The information provided by the pleader must be adequate to set forth the basis of his claim "as distinguished from a bare averment that he wants relief and is entitled to it." *See* Wright & Miller, *Federal Practice and Procedure:* Civl 2d 1215 at 145 (1990).

The State's Motion alleges that the Complaint contains no factual allegations, rather "conclusory statements and criticism" that represent disagreement with the actions performed by State Court judges "acting in their judicial capacity." The court agrees. The Complaint is an incoherent ramble whose leaps carry the pleading far afield of the short and plain statement on the grounds for jurisdiction and relief that is required by Rule 8(a). The Complaint contains neither a clear statement of his claims nor the minimal factual allegations required to prove them, even when viewed thorugh a liberal lens of standards for interpreting complaints. "[T]he plaintiff is only required to state facts sufficient to give the opposing party fair notice of the claim." *DiRito v. Ideal basic Indus., Inc.*, 617 F. Supp. 79, 81 (D.C. Colo. 1985). Here, Barnett has failed to do so.

ii. Eleventh Amendment Immunity

Principles of sovereign immunity under the Eleventh Amendment also bar this court's consideration of the Complaint. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Supreme Court has repeatedly held this amendment to bar suits against a state by its own citizens even though the text does not explicitly say so. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Thus, suits in federal court against a state are barred unless the state has waived its immunity. *See Pennhurst State Sch. & Hosp. V. Halderman*, 465 U.S. 89, 100 (1984). Further, this sovereign immunity has not been abrogated by claims pursuant to 42 U.S.C. 1983, which allows claims against a person who, under color of state law, custom, or usage deprives a citizen of rights, privileges, or immunities under the U.S. Constitution. *See Quern v. Jordan*, 440 U.S. 332, 341 (1974). Because the State is immune, the Complaint is barred.

Accordingly, **IT IS RECOMMENDED** that the State's Motion to Dismiss (filed March 1, 2002) be **GRANTED** and this civil action be **DISMISSED**.

Advisement to the Parties

Within 10 days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with

the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. 636(b)(1). Objections to a magistrate judge's recommendation must be made within 10 days of service of the Recommendation. 28 U.S.C. 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995).

The district judge shall make a *de novo* determination of those specific portions of the proposed findings or recommendations to which specific objection is made. 28 U.S.C. 636(b)(1). A general objection that does not put the district court on notice of the basis for the objections will not preserve the objection for *de novo* review by the district court. *See In re Griego*, 64 F.3d at 583; *United States v. One Parcel of Real Property Known as 2121 East 30th Street, Tulsa, Oklahoma*, 73 F. 3d 1057, 1060 (10th Cir.), *cert denied*, 519 U.S. 909 (1996). The district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. 636(b)(1). The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. 28 U.S.C. 636(b)(1).

"[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *One Parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d at 1060. Failure to make timely objections to the magistrate judge's proposed findings and recommendations will be *de novo* review by the

district judge's proposed findings and recommendations will be *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *In re Key Energy Resources, Inc.*, 230 F.3d 1197, 1199-1201 (10th Cir. 2000); *Theede v. United States Department of Labor*, 172 F.3d 1262, 1267-68 (10th Cir. 1999); *One parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d at 1059-60.

DATED at Denver, Colorado, this 27th day of June, 2002.

BY THE COURT

/Signature/

Craig b. Shaffer

United States Magistrate Judge

(Footnotes)

[1] That case was dismissed by the Arapahoe County District Court, and the dismissal was affirmed by the Colorado Court of Appeals. After unsuccessfully petitioning the Colorado Supreme Court to hear the case in December 2001, the Plaintiff filed this action, alleging that the State of Colorado "collu[ded] with the media [to] punish Daniel James Barnett for a crime he has never been charged with nor convicted."